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CONVEYANCER'S NOTEBOOK

RENT ACT, 1957

It may be convenient to draw attention to the important dates and times under the Rent Act:

November 7, 1956:	Date for ascertaining rateable value (s. 11 (1)).
April 1, 1957:	Proposals made on or after this date do not affect rateable values for the purpose of deciding whether premises are decontrolled or not (Sched. V, para. 2).
June 6, 1957:	Royal Assent.
July 6, 1957:	The Act came into force.
August 17, 1957:	Last date for service of a notice by a tenant claiming a reduction in gross or rateable value on account of improvement (Sched. V, para. 11). (This must not be confused with a tenant's claim for compensation for improvements under Sched. IV, para. 5.)
October 6, 1957:	Earliest date for increase of controlled rent. Three months' notice must be given (s. 2 (2)). Last date for service of notice of disclaimer by tenant where lease contains escalator clause (Sched. IV, para. 9).
October 19, 1957:	Last date for an application to court for determination of tenant's right to a reduction in gross or rateable value on account of improvements.

April 6, 1958:	Earliest date for increase of controlled rent, exceeding 7s. 6d. per week Nine months after service of first notice (s. 2 (2)).
October 6, 1958:	First date on which possession of decontrolled houses can be obtained or from which higher rent can be required, unless three-year lease entered into. Six to fifteen months' notice to quit must be given (Sched. IV, paras. 2 and 4).
July 6, 1960:	First date from which premiums may be charged for decontrolled houses under leases not exceeding 21 years (s. 13 (1)).
March 31, 1965:	Date of decontrol of requisitioned houses where the landlords have accepted the licensees as tenants under the Requisitioned Houses and Housing (Amendment) Act, 1955 (s. 11 (5)).

THE RATING AND VALUATION ACT, 1957

The new valuation lists came into force on April 1, 1956, and many ratepayers received shocks. The owner of an ordinary dwelling-house found that, though his assessment had probably increased, he was nevertheless often paying less in rates than before; the owner of business premises found that, though the rates had gone down, his assessment had risen so sharply that he was paying much more than previously. It will be remembered that, as a result of the Valuation for Rating Act, 1953, dwelling-houses were valued on a 1939 basis; industrial premises are derated under the Rating and Valuation (Apportionment) Act, 1928; and public utilities are valued in their own peculiar way. As a result of this a disproportionate burden fell on offices, shops and business premises, and the new Act is designed to give some relief from this burden. Section 1 provides that in the case of such premises the rateable value shall be reduced by one-fifth. In the case of premises partly occupied as a private dwelling-house and partly for business purposes, the reduction is one-seventh. The relief applies to any rate period after April 1, 1957. The Act makes consequential adjustment in the case of charities and similar bodies entitled to the privileges conferred by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and increases the amounts payable for rates or in lieu of rates by the nationalised industries.

PRELIMINARY INQUIRIES

The Solicitors' Law Stationery Society Limited have recently published a new edition of their " Inquiries before Contract for Sale,"

together with "The Oyez Guide to Inquiries before Contract." As a high proportion of practitioners use this form it is perhaps not amiss to make a few observations on it. The principal difficulties facing the author of the form is that he wishes to be comprehensive but, on the other hand, he probably knows that many practitioners do not bother to adapt the form to meet the particular case. The printed inquiries, untouched, are used indiscriminately to cover the purchase of a surburban house registered with absolute title, the purchase or taking on lease for a long term of a flat, the purchase of a vacant site or even the taking on lease of a shop at a rack rent, no premium being taken. This practice, reducing the asking of preliminary inquiries to a meaningless formula, has brought its reaction: some vendor's solicitors reply, without referring to their clients, "We do not know," etc. The purchaser's solicitors seem quite happy. Indeed, when one solicitor, in answer to the question whether there were any financial obligations affecting the property, replied "Yes," the purchaser's solicitor appeared to be quite content, for he did not follow the matter up.

To overcome the difficulties mentioned above, the new form divides the inquiries into seven parts of which three are compulsory and the remainder optional, rather like the Law Society's Final Examination. There are eighteen questions in all, but, again like the Final, many are subdivided. Then there is a note that "Replies will be assumed to be those of both Solicitor and Client." This is open to serious objection and we suggest that practitioners should strike it out. The replies are representations and a vendor's solicitor hardly expects to act as insurer for his client. If the client says the boundary wall belongs to him, there is no reason for the solicitor to warrant the reply. A reply must be that of the client, unless the answer otherwise indicates.

The questions on planning are too wide. The trouble, we suggest, is that they ask too much at the first bite. It is nearly ten years since the 1947 Act started to operate, and in very many cases the plain fact is that the premises have at all material times been used as a dwelling-house and that there has been no development. In others the vendor's knowledge does not go back the full period and in most cases there is no need to go back all this time. Until it is known what the purchaser wishes to do with the premises, it is hardly feasible to frame detailed questions on this subject. Then there is question 7, asking whether the property is subject to financial obligations and whether there are any orders, schemes, notices, resolutions, etc., affecting the property. The Guide indicates that on the first part of the question the author has in mind a *representative list* (his italics, not ours) of some twenty-seven statutes. All we can say is

that this confirms our view that the question should not be answered. It is quite true that a purchaser can before contract ask whatever questions he likes, but, with respect, a question, like a requisition, should be directed to a specific point, capable of a reasonably precise answer. To ask whether a vendor has received a notice affecting the land is a reasonable one capable of a precise answer, but to ask him or his solicitor whether some twenty-seven or more Acts affect the property is quite unreasonable. How many readers know offhand whether the Atomic Energy Act, 1946, the Radioactive Substances Act, 1948, or the Clean Air Act, 1956, affects their own houses? It should not be overlooked that a vendor has certain obligations of disclosure imposed upon him by the general law.

Another question we do not like is number 8: "Is there a prospective liability for charges in respect of the roads, footpaths or sewers abutting on the property?" It seems to us that the question is one of mixed fact and law, and we think that though it is reasonable to answer questions of fact—*e.g.*, Is the road made up? Is the property drained separately into the main sewer?—it is for the purchaser's solicitor to advise his client on the law. The Guide merely tells us that the question is "self-explanatory."

It is only fair, however, to state that in other respects the new form is an improvement. By keeping all the tenancy questions together there is a hope, at least, that where property with vacant possession or new property is being sold, vendors will not be vexed with a lot of irrelevancies. The question on by-law approval, which can rarely be answered, has now been considerably improved by restricting the question to the vendor's period of ownership and, in effect, to what is in the title deeds.

We do suggest that solicitors acting for purchasers should adapt the form to suit the particular case with more care than has been the general practice in the past.

Flats and Road Charges

We drew attention to the Scottish case of *Stewart* v. *Greenock Corporation* (1956) 73 Sh.Ct.Rep. 29 at p. 178, *ante*, and the relevant English statutory provisions. We suggested that in England the upper flat owner might have had to contribute to the making-up of the street under the Private Street Works Act, 1892, on the ground that, though his premises did not adjoin or abut on the street, access was obtained "through a court, passage or otherwise." Mr. Garner writes to say that "it is reasonably clear that 'otherwise' in the phrase quoted must be construed *ejusdem generis* with 'court' and 'passage' and it almost certainly does *not* include

another street: see, *e.g.*, *Chatterton* v. *Glanford R. D. C.* [1915] 3 K.B. 707, where Lord Reading C.J. said, 'I cannot think that the legislature meant to give "otherwise," as regards the character of the access, a wider meaning that would be attributed to the words "court or passage." The access must be by a court or passage or something like it. It was not intended to include a street.'

"It would seem, therefore, that the decision in England would be the same as it was in Scotland, whether the local authority were operating under the Public Health Act, 1875, s. 150, or under the Private Street Works Act, 1892."

With respect, on reconsideration, we entirely agree with what Mr. Garner says. Different considerations would, of course, arise where access to the flat is obtained through a common garden or court over which the flat owners have rights and the position would depend on the particular Act under which the local authority proceeds.

A Way Round the Landlord and Tenant Act, 1954, Part II?

We publish in this issue a form (Form 17, *post*, p. 723) of interest to all persons concerned with business tenancies. The author of this form suggests that it is possible—quite simply—to let property for business purposes in such a way that, at the conclusion of the tenancy, the tenant will have no rights whatever under the Landlord and Tenant Act, 1954, Part II.

It may be objected that the terms of section 38 of that Act, which was drafted on the basis of experience provided by the Landlord and Tenant Act, 1927, are so wide that it is not possible to contract out of Part II of the 1954 Act. For section 38 provides as follows:

> "38.—(1) Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination or the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event.
>
> "(2) Where—
>
> (a) during the whole of the five years immediately preceding the date on which the tenant under a tenancy to which this Part of this Act applies is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes, and

(b) if during those five years there was a change in the occupier of the premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change,

any agreement (whether contained in the instrument creating the tenancy or not and whether made before or after the termination of that tenancy) which purports to exclude or reduce compensation under the last foregoing section shall to that extent be void, so however that this subsection shall not affect any agreement as to the amount of any such compensation which is made after the right to compensation has accrued.

" (3) In the case not falling within the last foregoing subsection the right to compensation conferred by the last foregoing section may be excluded or modified by agreement."

The author of the form points out, however, that section 38 relates only to " a tenancy to which this Part [*i.e.*, Part II] of this Act applies "; and that section 23 (4) of the Act provides as follows:

" 23.—(4) Where the tenant is carrying on a business, in all or any part of the property comprised in a tenancy, in breach of a prohibition (however expressed) of use for business purposes which subsists under the terms of the tenancy and extends to the whole of that property, this Part of this Act shall not apply to the tenancy unless the immediate landlord or his predecessor in title has consented to the breach or the immediate landlord has acquiesced therein.

" In this subsection the reference to a prohibition of use for business purposes does not include a prohibition of use for the purposes of a specified business, or of use for purposes of any but a specified business, but save as aforesaid includes a prohibition of use for the purposes of some one or more only of the classes of business specified in the definition of that expression in subsection (2) of this section."

Accordingly, the author suggests if a lease of business premises contains a general prohibition of use for business purposes extending to the whole of the property, *and such prohibition is limited to the last year of the tenancy*, Part II of the Act will not apply to the tenancy during its last year, since the prohibition during that year *subsists* under the terms of the tenancy and extends to the whole of the property. Accordingly, it is suggested, the tenancy cannot continue by virtue of section 24 (1) of the Act, since the tenancy is not one to which Part II of the Act applies; for either the tenant

is carrying on business in breach of the subsisting prohibition of user for business purposes, *or* he is not carrying on business, in which case Part II of the Act is inapplicable because the property comprised in the tenancy is not and does not include premises which *are* occupied by the tenant, and are so occupied for the purposes of a business carried on by him or for those and other purposes: see section 23 (1) of the Act. Moreover, since the tenancy has not been continued, the author submits, section 24 (3) (a) of the Act is not applicable, since this provision only applies to cases where the continuation of the tenancy has already begun.

There is, in practice, rather limited scope for the use of the form, for clearly a tenant would have to be very hard pushed before he would accept a lease under which he has to pay rent for the full term but is unable to make use of the premises during the last year. Nevertheless, there are cases where it would be quite proper to grant and accept a lease in the form suggested, as, for example, where a tenant principally wants the premises as a residence and only temporarily for some business purposes, and expects to have separate business premises in a year or two if or when the planning authority have given permission to use residential premises for business purposes for a limited period.

There are other cases where the landlord can only expect a tenant to accept such a lease if the tenant receives some *quid pro quo*, for example, by way of a substantially reduced rent. Sometimes a landlord cannot make proper arrangements for dealing with his property unless he knows he can secure vacant possession of the whole property and is willing to accept a lower rent to ensure this. It is unfortunate that the Government refused to accept good estate management as a ground for possession.

In appropriate cases, solicitors acting for landlords may be able to include a prohibition of the kind under discussion, though it will not be possible, until the question has been tested in the courts, to be sure of their attitude towards such a prohibition.

Forestry Lease

It is desired to point out that the form of Forestry Lease published in the last issue (Form 11, *ante*, p. 698) was not drafted for or on behalf of the Minister of Agriculture, Fisheries and Food, and that some of its provisions may, in any particular case, be unacceptable to the Minister. Further, it is understood that certain other provisions commonly appear in Forestry Leases and it is hoped to publish some additional clauses in the near future.

THE RENT ACT, 1957

By Donald Keating, b.a., Barrister-at-Law
and
Christopher Friday, b.a., Barrister-at-Law

The Rent Act, 1957, came into force on July 6, 1957 (*a*). This is the first of a series of explanatory articles and is intended as an introduction to four of the more immediate aspects of the Act. In further articles it is proposed to deal in particular with the provisions enabling landlords of dwelling-houses remaining subject to the control of the Rent Acts (*b*) to recover increased rents and with the provisions as to decontrol.

Four Weeks' Notice

Before dealing with the amendments to the Rent Acts, it may be convenient to note the one amendment to the general law of landlord and tenant. Section 16 provides:

> "No notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect."

There is no definition of the word "dwelling" for the purposes of this section (*c*). The word was never defined in the Rent Acts and it is only as a result of judicial interpretation that a dwelling for the purposes of those Acts must include "all the major activities of life, particularly sleeping, cooking and feeding" (*d*). The various authorities discussing the meaning of the word for the purposes of the Rent Acts, particularly those which deal with premises used partly for residential and partly for business purposes, will, it is suggested, be of assistance in arriving at the meaning of the word as used in section 16. But unlike the Rent Acts which applied initially only to premises "let as a separate dwelling" (*e*), section 16 appears to apply equally to premises shared by the tenant with his landlord

(*a*) s. 27 (2).
(*b*) A phrase which by the combined operation of s. 25 (1) of the 1957 Act and s. 49 (1) of the Housing Repairs and Rents Act, 1954, means the Rent and Mortgage Interest (Restrictions) Acts, 1920–1939.
(*c*) *Cf.* s. 25 (1).
(*d*) *Wright* v. *Howell* (1947) 92 S.J. 26, C.A., *per* Scott L.J. See also Stroud, *Judicial Dictionary*, 3rd ed., p. 903.
(*e*) Act of 1920, s. 12 (1).

or another tenant as it applies to premises occupied solely by the tenant.

The section overrides any express provision in a contract of tenancy which provides for the termination of the tenancy by a notice to quit of a shorter duration than four weeks. The section cannot affect a term certain of, say, a week or a fortnight.

The Rent Limit under the Act

In respect of premises remaining within the control of the Rent Acts, the limit on the rent recoverable can most conveniently be calculated from the following equation:

Annual rent limit =

$$(1956\ \text{G. V.} \times 2) + \text{R} + \text{S} + \text{F}$$

where "1956 G. V." equals the gross value of the dwelling as at November 7, 1956 (*f*) (subject to any special modifications resulting from the Fifth Schedule); "R" equals the annual amount of any rates borne by the landlord or a superior landlord (*g*); "S" equals an annual amount representing a reasonable charge for any services provided by the landlord (*h*); "F" equals the annual amount representing a reasonable charge for any furniture which the tenant is entitled to use under the terms of his tenancy (*i*). In order to discover the limit on the rent recoverable from a tenant for any rental period, *i.e.*, the period in respect of which a payment of rent falls to be made (*k*), the annual rent limit must be divided by the number of rental periods in a year.

Any apportionment of 1956 G. V. in respect of a dwelling not separately rated and the amount of S and F may be agreed between the landlord and the tenant or determined by the court (*l*).

The factor of 2 in the above equation operates where the landlord is, or is deemed for the purposes of the Act to be, responsible for all repairs except internal decorative repairs. The factor is varied where the responsibility for repairs is different. Thus, where the tenant is responsible for all repairs the factor is $1\frac{1}{3}$ (*m*). Where the tenant is responsible for some but not all repairs the factor is such figure between $1\frac{1}{3}$ and 2 as may be agreed or determined by the

(*f*) s. 25 (1).
(*g*) See s. 1 (1) (a).
(*h*) See s. 1 (1) (b).
(*i*) See s. 1 (1) (b).
(*k*) s. 25 (1).
(*l*) Sched. V, para. 1 (b); s. 1 (1) (b); References to "the court" are to the county court, see s. 19 (1).
(*m*) Sched. I, para. 1 (2).

court (*n*). If the landlord is, or elects in the prescribed manner (*o*) to be, responsible for internal decorative repairs, the factor is $2\frac{1}{3}$ (*p*).

Where, however, the annual figure produced by the equation is less than the rent recoverable by virtue of the Rent Acts, the latter figure is to be the rent limit under the Act (*q*).

The rent limit is subject to adjustment in respect of changes in the amount of the rates borne by the landlord or a superior landlord, and changes in the furniture and services taken into account in calculating the rent limit (*r*). The rent limit may also be increased by 8 per cent. per annum of the cost of any improvement, including private street works (*s*), effected after July 6, 1957, by the landlord or a superior landlord (*t*). The rent limit may be reduced in case of disrepair (*u*). The manner in which such changes are effected will be discussed in the next article.

The landlord can only increase the rent payable prior to July 6, 1957, to the rent limit fixed by the Act by the service of a notice in the prescribed form (*a*). This and the other provisions relating to rent increases will be examined in more detail in the next article. However, it should be pointed out that no notice purporting to be given under the Act but which was served before July 6, 1957, is effective. The Act, unlike the Landlord and Tenant Act, 1954, does not contain transitional provisions (*b*) enabling valid notices to be served between the passing of the Act and its coming into force.

DECONTROL

The Rent Acts cease as from July 6, 1957, to apply to all dwelling-houses with a rateable value in the Metropolitan Police District or the City of London of over £40, and elsewhere in England and Wales of over £30 (*c*). Where a dwelling-house does not have a separate rateable value, an apportioned rateable value must be agreed or determined by the court (*d*).

Despite this substantial measure of decontrol a landlord of such premises is not put immediately into his ordinary common law position. There are important transitional provisions (*e*). Thus,

(*n*) *Ibid.*, para. 1 (3).
(*o*) *Ibid.*, para. 2 (2).
(*p*) *Ibid.*, para. 2 (1).
(*q*) s. 1 (3).
(*r*) ss. 1 (2), 3 and 4.
(*s*) s. 18.
(*t*) ss. 1 (2) and 5.
(*u*) s. 1 (2) and Sched. I, Part II.
(*a*) s. 2 (2) and Forms A, B and C in the Rent Restrictions Regulations, 1957, S.I. 1957, No. 981.
(*b*) See Landlord and Tenant Act, 1954, Sched. IX.
(*c*) s. 11 (1).
(*d*) s. 25 (1) and Sched. V, Part I.
(*e*) Sched. IV.

in respect of a statutory tenancy or a controlled tenancy, which would or might come to an end by effluxion of time or by notice to quit before October 6, 1958, the landlord can only recover possession, otherwise than upon the grounds provided under the Rent Acts (*f*), upon the expiry of at least six months' notice to quit expiring not earlier than October 6, 1958 (*g*). Where an apportionment of rateable value is necessary, the notice to quit cannot be served until the apportionment has been made (*h*). Until such a notice expires the tenant remains in possession, paying the old controlled rent, subject only to adjustment in respect of any difference in the amount of rates payable by the landlord or a superior landlord (*i*).

An exception to this transitional preservation of the *status quo* is in respect of decontrolled premises occupied both for residential and business purposes which become subject, after July 6, 1957, to Part II of the Landlord and Tenant Act, 1954 (*k*). In such cases the landlord can serve a notice under section 25 of the 1954 Act which can take effect to terminate the tenancy before October 6, 1958.

Another exception is that during the transitional stand-still period the landlord and tenant may agree for the grant to the tenant of a tenancy which cannot expire by effluxion of time or by notice to quit given by the landlord earlier than three years from its commencement. The transitional provisions do not apply to such a new tenancy (*l*), and the rent payable under the tenancy is not subject to any statutory restriction.

New tenancies coming into operation after July 6, 1957, of dwelling-houses whose rateable values are below the figures given above are also decontrolled (*m*). But the new tenancy is not decontrolled if it is granted to the protected tenant and comprises the same premises as those in which he was formerly protected, or consists of part or includes part of such premises (*n*).

Having decontrolled certain tenancies subject to the Rent Acts, the Act also lifts control from premises with rateable values in excess of the above limits which have been let furnished under a contract to which the Furnished Houses (Rent Control) Act, 1946, applied (*o*). Here again there are statutory fetters upon an immediate resumption of possession by the landlord. A notice to quit

(*f*) See the Act of 1933.
(*g*) Sched. IV, paras. 1 and 2.
(*h*) *Ibid.*, para. 2 (3).
(*i*) *Ibid.*, para. 3.
(*k*) *Ibid.*, para. 2 (6).
(*l*) *Ibid.*, para. 4.
(*m*) s. 11 (2).
(*n*) Proviso to s. 11 (2).
(*o*) s. 12 (1).

such premises given before July 6, 1957, cannot take effect before October 6, 1957, unless the Rent Tribunal in proceedings under the 1946 Act has substituted a shorter period of security of tenure than the full three months (*p*). Until July 6, 1958, the landlord must give at least three months' notice to quit such premises (*q*).

Improvements by the Tenant

A tenant, or any previous tenant, who has made or contributed to the cost of an improvement amounting to a structural alteration, extension or addition, and made before November 7, 1956, can obtain a reduction of both the 1956 gross value and the rateable value of the premises (*r*). But he must before August 17, 1957 (*s*), serve upon his landlord a notice (*t*) requiring his landlord to agree to a reduction. Following the service of the notice the landlord and tenant may agree the amount of the reduction (*u*). In default of agreement the court determines whether the improvement is one in respect of which the reduction may be made, what works were involved, whether the improvement was made at the tenant's expense or he merely contributed to the cost, and the proportion of any contribution to the whole cost (*a*). The valuation officer then certifies whether the improvement affected the 1956 gross value or the rateable value, and by how much these values would have been reduced had the improvement not been made (*b*). A tenant who successfully takes advantage of these provisions may be able to bring back within the Rent Acts premises which had at first appeared to be decontrolled (*c*).

(*p*) s. 12 (2) (a).
(*q*) s. 12 (2) (b).
(*r*) See Sched. V, Part III. As to compensation for tenant's improvements see Sched. IV, para. 5.
(*s*) Sched. V, para. 11 (1).
(*t*) See Form T in the Rent Restrictions Regulations, 1957.
(*u*) Sched. V, para. 12 (1).
(*a*) *Ibid.*, para 12 (2).
(*b*) *Ibid.*, para. 13.
(*c*) *Ibid.*, para. 14.

VARIABLE RENTS

By B. Hargrove, Barrister-at-Law

The steady decrease in the purchasing power of the pound and the rigid control of rentals by legislation have combined together to produce a situation where the customary forms of rental clauses in leases are proving inadequate for the proper protection of the property owner. The landlord who, at the turn of the century, entered into a lease of (say) ninety-nine years at a rent which then appeared to be adequate is now faced with a situation which is nothing less than disastrous by reason of the depreciation of sterling.

It is, therefore, necessary to consider whether some method whereby the rent varies in accordance with extraneous factors can be devised which would provide an effective safeguard against recession and inflation. Since the purchasing power of the standard unit has steadily decreased for the last forty years (*a*), with perhaps the exception of a short period in the 1920s, systems of variable rents are often decried as a landlord's weapon against a defenceless tenant. This is far from true and, indeed, the variable rent is of equal assistance to the tenant in times of slump as it is to the lessor in periods of inflation. Bearing these factors in mind, it is the object of this article to consider two of the many schemes of variable rents.

I. The Gold Clause

Until recently no case of a domestic contract involving a gold value clause had come before the English courts, but in *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* (*b*), it fell to the Court of Appeal to consider a rental clause in a lease worded in these terms:

> "paying therefor yearly during the said term either in gold sterling or Bank of England notes to the equivalent value in gold sterling the rent of one thousand nine hundred pounds . . . by equal quarterly payments."

The court held (Harman J. dissenting), reversing the decision of Lord Goddard C.J. (*c*), that the lessee's obligation was discharged by the payment of £1,900 in Bank of England notes.

(*a*) See Mann, *Legal Aspects of Money*, p. 84.
(*b*) [1956] 2 Q.B. 127; [1956] 2 W.L.R. 866. The case appeared in the House of Lords list, but was settled prior to hearing.
(*c*) [1955] 3 W.L.R. 996; [1955] 3 All E.R. 793.

On behalf of the lessors it was contended that the words "to the equivalent value in gold sterling" meant that the obligation was to pay such a sum as the gold content of 1,900 sovereigns or other gold coins might from time to time be worth, or, alternatively, such a sum as would be equivalent to the price which would be paid for the antique or hoarding value of 1,900 gold sovereigns. In rejecting these propositions the Court of Appeal seems to have acted upon two main grounds, namely, that as a matter of construction the words used merely indicated an alternative *manner* of payment and, secondly, *per* Denning L.J., that gold value clauses in domestic contracts were contrary to public policy and therefore void.

Mode of payment and measure of obligation

Since *Feist's* case (*d*) it has been firmly established that there is a distinction between those cases where a gold clause merely indicates the mode of payment and those where the clause serves to evaluate the measure of the obligation. In the former case, once the gold standard was abolished the obligation could be discharged by payment of the nominal sum in notes, whereas in the latter case the value of the gold was ascertained and that sum was converted into notes. It might, therefore, have been considered to be a prerequisite, when construing any money obligation, to inquire first whether the wording divided the obligation into different parts, one dealing expressly or impliedly with the manner of payment and another concerned with the value of the sum payable. In the *Treseder-Griffin* case, however, Denning L.J. indicates the manner in which the court would approach the problem in the following passage:

> "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which, in the eye of the law, everything else is measured. Prices of commodities may go up or down, other currencies may go up or down but sterling remains the same" (*e*).

The first criticism of this view is that, as Denning L.J. admits in the same paragraph, this interpretation has never been applied by the courts to international contracts. Whatever may be the arguments in favour of such a view on the issue of public policy there seems to be no reason, other matters being equal, why there

(*d*) [1934] A.C. 161.
(*e*) [1956] 2 Q.B., at p. 144. This nominalistic theory was rejected in *Stanwell Park Hotel Co., Ltd.* v. *Leslie* [1952] A.L.J. 35, at p. 37 by the High Court of Australia.

should be any presumption against a gold value clause in a domestic agreement which does not apply to one containing some " external " element. As Romer L.J. states (*f*):

> " . . . for, though, as I have already pointed out, in a contract of which the proper law is English the word ' pound ' prima facie means an English pound, it does not do so necessarily. It is a question of construction."

The case is put somewhat higher by Lord Russell of Killowen (*g*):

> " These gold clauses have, however, come under the review of judicial tribunals in many countries and the ' Feist construction ' has prevailed, in that they are generally regarded merely as clauses to protect one of the contracting parties against a depreciation of the currency. It would, I think, be regrettable if uniformity in this respect did not prevail, and a different construction should be applied, except in cases where the ' Feist construction ' is expressly excluded."

It is conceivable that if uniformity is desirable as between different jurisdictions in the interpretation of gold clauses it is far more necessary that there should not be, within a jurisdiction, two different standards of approach to such a clause depending on whether the contract is an external transaction or not.

Secondly, it is slightly ambiguous to speak of a man stipulating for a pound since this can imply either the manner or the measure of payment. In the majority of domestic contracts the two elements are combined, in that a person who agrees to accept a rent of £100 per annum *simpliciter* denotes that £100 in lawful currency will be the manner of payment and connotes that the value shall be governed by the worth of that nominal sum when paid. Upon this basis the courts have taken one step further by holding that there cannot normally be an implied gold value clause (*h*), but this is by no means coextensive with the principle as laid down by Denning L.J., nor does it amount to anything approximating to a presumption that in domestic contracts where the expression " pound " is used it will, in the face of other factors, always be a gauge for the manner and the value of the payments.

The judgment of Morris L.J. in the *Treseder-Griffin* case (*i*) is somewhat more detailed. The first ground upon which the learned

(*f*) *Broken Hill Properties* v. *Latham* [1933] Ch., at 409.
(*g*) *R.* v. *International Trustee for the Protection of Bondholders, etc.* [1937] A.C., at 556.
(*h*) *Ottoman Bank of Nicosia* v. *Chakarian* (*No. 2*) [1938] A.C. 260; *Ottoman Bank of Nicosia* v. *Sforza* [1938] A.C. 282; but see also *Ottoman Bank of Nicosia* v. *Descalopoulos* [1934] A.C. 354.
(*i*) [1956] 2 Q.B., at 149; [1956] 2 W.L.R., at 875.

judge found that the clause was only indicating a manner of payment was that the expression " in equal quarterly payments " was inappropriate to a gold value construction. This is perhaps a rather startling proposition since, assuming that this was a gold value clause, the purchasing power of each payment would be equal although the nominal bank note amount would vary. Further, it seems clear that the expression relates to four equal parts of the number of gold coins before ascertaining the paper equivalent since this itself is dealing with the manner of payment, not the value. Moreover, in the *Feist* case (*k*) it was held that even if the requirement of equal payments was inappropriate to a gold value clause it is preferable to accept the lack of symmetry in order not to deprive the clause of its meaning.

The second ground of importance urged by Morris L.J. was that since the lease was entered into in 1938 and at that time the worth of 1900 gold pounds would have been £3,344 15s. 6d., this would, in the circumstances, be an extraordinarily circuitous way of expressing an obligation to pay that amount. This view was answered by Harman J. in the course of his dissenting judgment in which he points out that the lease of 1938 was merely repeating the wording of a lease of 1930 and that it is in the light of those circumstances that the clause should be construed.

Uncertainty

The other reasons set out in the judgment can be grouped collectively under the heading of uncertainty. The problem centres around the absence from the relevant clause of any reference to sovereigns or to a standard of weight and fineness. It is true to say that very rarely has the expression " sovereign " occurred in cases coming before the courts and that the customary method of indicating a gold value clause has been by such expressions as " gold coins of Great Britain of the present (or standard) weight and fineness " (*l*). The exact type of coin is not specified but the standard of weight and fineness referred to is that set forth in the Coinage Act, 1870, which lays down four standards of weight (*i.e.*, £5, £2, £1 and half sovereign) but one standard of fineness for all gold coins, *viz.*, 11/12ths fine gold and 1/12th alloy. Yet in the *New Brunswick Railway* case (*l*) it was held that " present weight and fineness " was sufficiently certain to give rise to a gold value clause based on the gold content of the coins. This is not surprising for, since the weight of gold in the coins increases in

(*k*) *Ante*, p. 266.
(*l*) *New Brunswick Ry.* v. *British and French Trust Corporation* [1939] A.C. 1.

direct proportion to the nominal value, it does not matter what the denomination of the coins may be that make up the final sum, the total gold content will always be the same. Turning, therefore, to the *Treseder-Griffin* case, once it is established that "gold sterling" means lawful gold currency in circulation or possible use at the time of the making of the lease, it does not matter, from the point of view of a gold content construction, what denomination of coin is envisaged. It seems beyond the bounds of possibility that two parties contracting in Great Britain and referring to gold sterling in 1938, when the only gold coins which were legal tender were those conforming, or purporting to conform, to the 1870 Act, could possibly mean anything other than coins of that specification.

A further aspect of this lack of clarity in the gold clause was that in computing the obligation it was uncertain whether the gold content value or the antique or hoarding value of the coins was to be taken. There is, of course, nothing to prevent the parties to a lease binding themselves to pay rent in proportion to the scarcity value of an article, but it is difficult in the *Treseder-Griffin* case to arrive at any other conclusion than that of Harman J. that such a situation would not be within the contemplation of the parties (*m*).

The result of the construction applied by the Court of Appeal is to deprive the words "*to the equivalent value in gold sterling*" of any meaning at all and, indeed, this is recognised in the judgment of Morris L.J. (*n*). The more realistic approach to such problems is set forth by Lord Russell of Killowen in *Feist's* case (*o*):—

> "If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it."

Accordingly it is not an overstatement of the position to say that the interpretation of this term of the lease as being one governing the manner and not the value of the payment was more akin to destruction than construction.

(*m*) [1956] 2 Q.B., at 164; [1956] 2 W.L.R., at 886.
(*n*) [1956] 2 Q.B., at 156; [1956] 2 W.L.R., at 886.
(*o*) [1934] A.C. 161, 172.

Once the parties, in these circumstances, had shown that gold coins of Great Britain were to be the standard of equivalent value (and it is difficult to read the clause as meaning anything else) then, provided the gold content is to be the measure, any difficulty of uncertainty is overcome. The courts have indicated that even a bare reference may be sufficient to induce the court to regard this as an intention to create a gold value clause (*p*). Here, however, a distinction has been made within the clause itself, between the mode and the measure of payment. The first obligation is to pay the amount in gold (a mode of performance) or in Bank of England notes (an alternative mode of performance) but the number of such notes, and therefore the value of the obligation, is to be governed by the equivalent value in gold sterling. Thus, the lease has gone much further in its attempt to make the intention of the parties clear than a simple reference to gold.

The Permanent Court of International Justice, upon somewhat similar words (*q*), gives this view of the method to be employed when deciding whether a reference to "gold" in a contract is dealing with the mode or the measure of payment:—

> "One argument against the efficacy of the provision for gold payment is that it is simply a clause of 'style' or a routine form of expression. This in substance would eliminate the word 'gold' from the bonds. The contract of the parties cannot be treated in such a manner. When the Brazilian Government promised to pay 'gold francs' the reference to a well-known standard of value cannot be considered as inserted merely for literary effect or a routine expression without any significance. The court is called upon to construe the promise, not to ignore it."

It is submitted that in the *Treseder-Griffin* case the Court of Appeal in reality ignored the gold clause.

Public policy

It is a truism that the economic position of a currency, particularly that of a nation dependent on international trade, is to a large extent governed by the stability which such currency commands in the international money market. It is therefore difficult

(*p*) See Dicey, *Conflict of Laws*, 6th ed., p. 731; *R.* v. *International Trustee* [1937] A.C. 500, 566; *New Brunswick Ry.* v. *British and French Trust Corpn.* [1939] A.C. 1, 39; *Syndic in Bankruptcy of Khoury* v. *Khayat* [1943] A.C. 507, 522.

(*q*) *Case of Brazilian Loans*: Collection of Judgments, Series A, No. 21 (1928–1930), pp. 115, 116.

to comprehend why Denning L.J. should hold (*r*) that, while a gold clause is perfectly lawful in a contract of an external nature, in a domestic lease such a provision is against public policy and therefore void. While there is no doubt that in the *Treseder-Griffin* case the lease was properly called a domestic transaction, the future of the gold value clause in all types of leases and contracts has, as a result of this decision, been jeopardised. A typical example of a contract where doubt will now occur is the current form of airway-bill in which a gold value clause is inserted. Is the fact that the goods are being carried to a destination abroad sufficient or must there be some other foreign element to prevent the doctrine of English public policy operating upon and nullifying that term of the contract? Contracts of insurance, pension schemes and many others will all come within the mischievous penumbra of uncertainty when a gold value clause is used.

If the principle as laid down by Denning L.J. is correct it must also apply to all other methods to secure that the amount due under a contract will vary with some extraneous factor so as to safeguard the parties against a fall in the value of money. Under this heading the collective bargain based upon the cost-of-living index must also be void. An example of the view hitherto taken by the courts of this type of lease is *Kendall* v. *Baker* (*s*) where it was held that a rent which varied in accordance with the price of wheat was valid. This was obviously designed to tie the rental to an element in the cost of living and to protect the parties against violent trends in currency values. Indeed there have been a number of cases where the courts have recognised the use of extraneous factors both in leases and elsewhere as indicating the measure of the obligation.

In *Griffiths and Diggins, Ltd.* v. *General Universal Stores* (*t*) the plaintiff lessees held factory premises on a twenty-one years' lease from September, 1932, at an annual rental of £2,750. The lease contained a term for renewal at the lessees' request for a similar period with the proviso that if there should be a rise or fall of 10 per cent. in the cost of living or in the internal purchasing power of the pound, the rent should be adjusted in proportion to that alteration. The changes in the cost of living were to be ascertained by means of Board of Trade figures *or other accepted methods*. In fact no figures were issued by the Board of Trade but the plaintiffs, who wished to exercise their option, adduced

(*r*) [1956] 2 Q.B., at 144; [1956] 2 W.L.R., at 871. Morris L.J. did not rest his judgment on the grounds of public policy.

(*s*) (1852) 11 C.B. 842.

(*t*) [1953] C.P.L. 657, also [1953] C.L.Y. 2017.

expert evidence to show that the cost of living had risen by 113 per cent. and accordingly the new rental should be 213 per cent. of that previously charged, *i.e.*, £5,857 10s. 0d. The defendants opposed this view, chiefly because they calculated that the letting value of the premises had risen to £17,000 (*u*). They therefore contended that there was no contractual force in the clause since the language indicated further negotiation *and was void for uncertainty.* Vaisey J. rejected this argument, construed the words "adjusted accordingly" in the clause to mean "correspondingly or rateably," and granted a declaration that the plaintiffs were entitled to a new lease. Here the fact that the pound might vary in purchasing power was, in essence, the mainspring of this clause in the lease.

In *Stanwell Park Hotel Co., Ltd.* v. *Leslie* (*a*) the problem occurred in connection with a purchase of a house by instalments with the usual clause that the balance was to become due if the purchaser made default on the payment of any instalment. The purchaser was entitled to make payments on account of the purchase price in addition to the instalments. The purchaser made default and the vendor sued for the balance of the price. The complication arose from a clause which provided that

> "in order to provide for the equitable performance of the contract in the event of inflation and/or deflation of price levels if the Retail Price Index Number 'C' Series (weighted average for all items of household expenditure for the six capital cities), published by the Commonwealth Statisticians' Quarterly Summary of Australian Statistics, should have increased by 25 per cent. or more below the Index number for the years 1923–1927, for any period during the currency of the contract, then the amount of each payment shall be varied."

The clause then set out the manner of the calculation to be performed. Dealing with the issue whether the court was bound to hold that the initial purchase price of £2,600 could not be exceeded by operation of the variation clause, the High Court of Australia (Dixon, Williams, Webb, Fullager and Kitto JJ.) stated:

> "There is no principle of law preventing the parties adopting a fixed figure as the primary monetary expression of a liability and then proceeding to effect a substantive variation of a liability by providing that more or less money must be actually paid according as index numbers evidence a variation of price levels. That is only a method of measuring the actual liability contracted for."

(*u*) It is interesting to note that here it is the tenant who has been safeguarded against an inflationary trend and not the landlord.

(*a*) [1952] A.L.J. 35.

In this instance the fact that the amount of the purchase price outstanding could at any time be reduced or eradicated by a payment on account added to the difficulties of working out the final sum but the court refused to be deterred in construing the agreement and entered judgment for £4,112 for the appellants.

In neither of these cases, both concerned with domestic contracts, was mention made that the index formula was objectionable, and the view of conveyancers generally appeared as long ago as the twelfth volume of this publication (*b*) when it was considered that a precedent using the cost-of-living index was required and was duly supplied. It is also noteworthy that until the present case of *Treseder-Griffin* no question of a gold value clause being against public policy had ever been raised (*c*).

Whether or not the deduction that a principle of public policy has been violated was valid, it is open to question whether the method utilised by Denning L.J. in divining the grounds of public policy was completely justified. Having referred to 51 Geo. 3, c. 127, s. 3, to statutory provisions in Canada and the U.S.A., and to a ruling of the Cour de Cassation to the effect that domestic gold value clauses were illegal, Denning L.J. then holds that since such a clause would endanger a nation's currency, therefore it is against public policy. It is doubtful whether a statute, of itself, is capable of yielding a principle of public policy applicable to circumstances outside the strict terms of the Act and where there is no pre-existing principle of common law. Accordingly, *a fortiori* it must be questionable whether foreign statutes and decisions are a reliable guide to English public policy (*d*).

In *Fender* v. *St. John Mildmay* (*e*) Lord Atkin (*f*) stated that the doctrine of public policy should only be invoked where the harm to the public is substantially incontestable and does not depend on the inferences of a few judicial minds, in short, the contract should be given the benefit of the doubt. At first sight the damage to the public in the *Treseder-Griffin* case does not appear to be within the terms of Lord Atkin's judgment. Further, the reasons given for bringing such clauses within the operation of the doctrine of public policy are that it would provide a method which might be used by every creditor, lessor, mortgagee or debenture holder and that thereby sterling would not be able to withstand inflation.

(*b*) At p. 322.
(*c*) See Gutteridge 51 L.Q.R., p. 115; *British Year Book of International Law*, 1936, p. 128.
(*d*) The contention that the English statutes were merely declaratory of the common law does not seem well founded on detailed examination.
(*e*) [1938] A.C. 1.
(*f*) *Ibid.*, at p. 12.

To enter into a detailed examination of the economic effects of gold value clauses upon a currency would be inappropriate here. Suffice it to say that it is a matter of opinion how far the public interest is damaged if the parties gauge their obligations by the value of the purchasing power rather than the nominal value of the currency and that inflation, in this particular cycle, is the cause and not the effect of the gold value clause. Indeed, such a clause would be an equally effective safeguard for a lessee or mortgagor in times when the value of the currency increases and wages are accordingly lower.

It is now firmly established that the courts have no power to create new headings of public policy (*g*). Thus, where a particular transaction is said to be against public policy it is incumbent upon the tribunal to state the exact grounds on which such a proposition is based. In Lord Wright's words (*h*):—

> "The question may be stated to be, what are the definite propositions as to what interest of the State or what public injury is supposed to be involved, or how or on what principles of law the promise was unlawful. The matter must be decided on tangible ground, not on mere generalisations."

The only ground put forward by Denning L.J. is that domestic gold value clauses would cause sterling to become a discredited currency and that this should not be permitted. It may well be that inflation is a danger but what constitutes a contribution to that danger is surely a matter of national administration and it is not for the courts to say how far the individual's right to contract shall be attenuated in order to assist the policy (if any) of national administration.

> "Thus it is prima facie anomalous that a judge should attempt in settling private disputes to introduce into the law principles of state policy and to depart from the rules of the common law in order to invent doctrines of what is good for the common weal. Modern judges, I think, neither desire nor are qualified to fulfil this role" (*i*).

It might well be felt that in the *Treseder-Griffin* case the doctrine of public policy has been expanded rather than expounded (*k*), but whatever view is taken it is clear that gold value clauses cannot safely be used at present in leases to safeguard the parties against currency alterations.

(*g*) *Janson* v. *Driefontein Mines, Ltd.* [1902] A.C. 484, 491.
(*h*) *Legal Essays and Addresses*, p. 78.
(*i*) Lord Wright, *Legal Essays and Addresses*, p. 70.
(*k*) See *Fender* v. *St. John Mildmay* [1938] A.C. 1, 23.

II. The Percentage Lease

Percentage rents can only be employed in leases of business premises and the principal element of such a rent is that, in addition to a fixed minimum rent, the lessor is entitled to a further rent calculated upon a percentage of the lessee's sales, profits or turnover (called a sales factor) which arise by reason of the use of the premises. This type of lease is used very rarely in England but enjoys wide popularity in the U.S.A. (*l*), and to a smaller degree in Canada. It must, however, be admitted that the percentage lease requires the complete abandonment of the present comparatively simple form of reddendum and demands a far more extensive and complicated document.

The advantages of percentage rents are that the lessor, while having the expenses of maintenance assured by the minimum rent, has some protection against rising prices since the rental will be directly related to one of the sales factors. At the same time the lessor is more vulnerable to trade depressions and his position may have to be safeguarded by a provision that the lessor shall have the right to terminate or vary the agreement if the percentage rent does not achieve a certain figure in any three consecutive years.

There are numerous variations of the basic form of such rents, in some cases where the lessee covenants to carry out all repairs and to pay all outgoing expenses the minimum rental need not be charged. Even if the minimum rent is inserted in the lease the percentage can be made to operate only on all turnover in excess of (say) £2,000 per annum. The object of percentage rents is to ensure that the tenant will be in a position to meet his rent (*m*) in accordance with the state of his business and that the lessor will not be inconvenienced by having periodically to forfeit the leases of traders who are suffering difficulties during the initial period of their efforts. It is seldom adequately recognised that premises whereon several businesses have failed during the preceding years rapidly attain a reputation, often quite undeservedly, for being "in a bad position" or "lacking customer attraction." The system will obviously make the premises more attractive to persons commencing business and encourages a bolder approach by the tenant in his dealings, since his overheads will, normally, keep in step with the volume of his trade. These factors may well become increasingly important in the light of the alterations in

(*l*) *General Digest of All American Cases*, Vol. 22, Sect. K 200 1.

(*m*) Landlord and Tenant Act, 1954, s. 30 (1) (b): "persistent delay" in paying rent is a ground for refusing a new tenancy under the Act. See also Lloyd and Montgomerie, *Business Lettings*, p. 145.

rating and the reduction in credit terms which may lessen the number of willing tenants in the market.

Several disadvantages, apart from the complications already mentioned, are also implicit in the percentage rental system. The lessor is far more at the mercy of a dishonest tenant than in the present form of reddendum because of the opportunities of producing understated figures for the sales factors. On the lessee's side, where the business becomes very successful his total payments of rent will, in all probability, be considerably higher than those of his competitors who are paying fixed rents. While the lessor may avoid some of the fluctuations of currency he will at the same time be financially subject to trade deteriorations in the locality far more swiftly than under a fixed rent; for example, the setting up of a shopping centre might produce drastic effects on the percentage rental of a small trader in a nearby street.

A problem sometimes mooted in respect of these rents is whether, since they fluctuate, they can be properly described as rents at all. The common law has for many years recognised the mining lease (*n*) with its varying royalty, the wheat rent (*o*) and the partial wheat rent (*p*) and, therefore, it seems beyond all doubt that since a percentage rent is similarly a varying rent which can be calculated prior to payment, it will be accepted as a rent in the full meaning of the term.

The principal difficulty in a percentage lease is finding a satisfactory formula to express the sales factor (*q*). The unqualified use of such words as "sales" or "receipts from sales" is fraught with endless possibilities for dispute. A typical example of the confusion which can result occurred in *Bramhall Tudor Cinema Properties* v. *Brennan's Cinemas* (*r*) where the plaintiffs let a cinema to the defendants for £1,560 a year plus an additional rent "equal to 20 per cent. of gross takings (less entertainment tax)." The Court of Appeal (Singleton, Jenkins and Parker L.JJ) held that gross takings meant box office takings only and did not extend to sales of programmes, ice cream, sweets and other articles sold to the public at the cinema. Another illustration is the hire-purchase agreement under which the tenant may receive payments for a number of months but the goods are eventually returned and no sale ever takes place. Credit sales provide the converse problem, here the sale takes place at the time when the first payment is made but there will be a number of other payments made

(*n*) *R.* v. *Westbrook* and *R.* v. *Everist* (1847) 10 Q.B.D. 178.
(*o*) *Kendall* v. *Baker* (1852) 11 C.B. 842.
(*p*) 18 Eliz. 1, c. 6. See varying rents for the Universities of Oxford and Cambridge and the Colleges of Winchester and Eton.
(*q*) 51 *Columbia Law Review* 186. (*r*) *The Times*, October 19, 1955.

later. Yet another variety of problem arises when articles are taken in part exchange and then resold by the lessee. There will appear at first sight to have been two sales, one of the new article and one of the exchanged article, whereas, in fact, the true position can only be ascertained by deducting the exchange value of the resold article from the sale price of the new article. Equally, barter transactions produce complications since these cannot be regarded either as sales or receipts in the strict sense of the words, yet they should clearly be brought into account in assessing the percentage rent. These, together with the "thrift-club" purchases, advertising vouchers and payments to traders for exclusively selling a particular manufacturer's products all present different problems and each case must be catered for individually. Thus the provisions of a lease of a garage from which taxis ply for hire, and therefore earn profits off the premises (*s*), must differ considerably from those for a factory selling its entire output at less than cost to a wholly owned subsidiary company. Generally speaking, however, the object of the sales factor clause must be to ensure that all payments whether cash, credit or kind which arise from the sale, loan, hire or other dealing concerning any article, or from the rendering of services, whether on or off the premises, which emanate in whole or in part from the use of the premises shall be taken into account in arriving at the percentage rent.

Second only in importance to the sales factor clause in a percentage lease are the provisions dealing with the method of accounting (*t*). It is essential that the sales factor of a preceding quarter or other period should govern the rental since, if the current period were to be used, then the amount payable could not be ascertained on the quarter day and the whole percentage rent would be uncertain. The accounting provisions should set out all the various books, ledgers, tillrolls, vouchers, etc., which the tenant is to keep and should provide for the appointment of an independent accountant whose annual or other periodic audit will be binding on both parties. Further, where refunds are made or articles are sold below cost the accounts paragraphs should make it clear whether these are matters which are to be allowed as valid deductions.

Two situations of particular interest are those problems concerning purchase tax and the date when an entry of a transaction should be made in the books of account. The parties may decide

(*s*) Similar considerations will apply to premises from which door-to-door salesmen operate.

(*t*) See Landis, "The Drafting of Percentage Leases," *Law Journal of the University of Toronto*, Vol. XI, No. 1, 1955, pp. 43, 53.

that purchase tax or similar sales taxes should be excluded from the computation of the percentage rent. The real difficulty is to decide in the case of future taxes how wide this particular exception should be drawn and it is usual to make a distinction between a tax upon the seller and a tax upon the sale itself, allowing only the latter as a deduction. For practical reasons it may be simpler to include all such taxes in the gross sales factor and to accept a lower percentage. When a particular sale is entered in the books it is of great importance in a fluctuating trade. Thus if the trade is seasonal and the rent is to be calculated quarterly there may be three-quarters of the year when the minimum for a percentage rent is not reached, and one quarter when the figure is greatly exceeded. It will, therefore, be in the tenant's interest in such cases to delay the receipt of earnings during the profitable period and, by equalising out the rate of receipt, baulk the lessor of receiving a percentage rent for any of the four quarters. From the tenant's point of view, where the trade is seasonal it is preferable to have an annual, rather than a quarterly, accounting period. This problem also occurs in a similar form where a transaction takes place during a tenancy but receipt of the cash happens after termination.

As already stated the lessor is reliant upon the good faith of the tenant but there should normally be a system of " spot checking " of the records to be carried out at any reasonable time without notice by the independent accountant on the instructions of the lessor. The accountant's findings will, as in the case of other audits, be binding on the parties but where the check shows a discrepancy of more than (say) 4 per cent. between the actual sales factor and the records, then the lessee should bear the costs of the check. In such circumstances the lease can also provide that certain rights of termination, compensation or variation shall accrue to the lessor. The percentage rental system would be unworkable if the tenant were not protected by the lessor being bound to secrecy in respect of all trading accounts disclosed to him by the lessee.

A landlord has considerable interest in the manner in which a business is being run under a percentage lease. It will probably be necessary to have comprehensive provisions dealing with the hours of trade, commodities to be sold and the manner of sale (cash or credit or both). The most important of these provisions will be that the tenant is bound to carry on the business from the premises at all times during the tenancy, subject to certain exceptions such as expansion of the business into adjoining premises. It is conceivable that occasions may arise where it will be in the tenant's interest to limit the turnover of the business, but, if the percentage rent is based on the turnover or the gross takings, this will not be in the

interests of the lessor. Where the lessee does act so as to reduce the turnover of the business deliberately the lessor may be given the right to terminate the tenancy or to vary the rental by returning, for the residue of the term, to a higher fixed rent. The difficulty about termination in all these cases is that the tenant's rights under the Landlord and Tenant Act, 1954, may do much to draw the teeth of such a clause and therefore variation of the rent upon notice is usually to be preferred.

A percentage lease normally requires that the tenant can only sublease the premises to a person who will carry on the same trade and upon the same or better terms than those contained in the head lease. In such a case the tenant will receive from the subtenant at least the usual percentage rent for which he will have to account to the lessor while any additional percentage the tenant may obtain will be a profit for himself. The lessor will also have the same rights to check the subtenant's books as he would have had in relation to the tenant if the subtenancy had not been granted. The lessor, in turn, will be bound not to lease any neighbouring premises to competitors in that particular trade, and in any case, in a percentage lease, it is against the lessor's interest to do so.

Finally, the landlord may discover, after a number of years that the percentage rent is proving a loss to him owing to the incompetence of the tenant. In these cases the position can be met by allowing the landlord to revert to a more substantial fixed rent or to terminate the lease. On the other hand, the tenant may be too successful and therefore similar provision may be made for the tenant to reduce the percentage.

The foregoing can be but a brief outline of a very extensive subject but, as the law stands at present, in spite of their novelty and detailed requirements, percentage leases are one of the few practical methods of dealing with some parts of the problems of the parties to a lease which are caused by variations in the economic position. Moreover, since the landlord may, under the Landlord and Tenant Act, 1954, have a term of fourteen years forced upon him by the court, a percentage rent might mitigate the hardship which could occur during such a period. Some doubt might be entertained whether such a rent could ever be computed without taking into account some element due to the goodwill attaching to the premises by reason of the lessee's having previously carried on business there, but the better opinion would seem to be that the previous sales by the tenant from the premises are not to be taken into account in assessing the first percentage rent, and thus difficulties which might arise from section 34 (a) and (b) of the Landlord and Tenant Act, 1954, may be avoided.

TRUSTS FOR PAYING DEBTS

By Professor L. A. Sheridan, ph.d., ll.b., Barrister-at-Law

I. Revocable Mandate

At first glance, an assignment of property expressed to be on trust for the payment of the assignor's creditors might be expected to receive the same treatment as other non-charitable purpose trusts (or resulting trusts subject to overriding powers of appointment for non-charitable purposes, as they are on a rigorous analysis). To a degree, that is what has happened, but it is not entirely so. The peculiar feature of this type of assignment is that, in general, the debtor is accorded a power of revocation although nothing is said about revocability in the trust instrument (*a*). This has led to use in some quarters of the expression "illusory trust." The theory that such a "trust" is a revocable mandate is based on the assumption that the arrangement is for the convenience of the debtor, and is not made with a view to conferring any benefit on creditors. In the words of Lord Brougham, in *Garrard* v. *Lord Lauderdale* (*b*):

> ". . . I take the real nature of this deed to be, like that in *Wallwyn* v. *Coutts* (*c*), not so much a conveyance vesting a trust in A for the benefit of the creditors of the grantor, but rather that it may be likened to an arrangement made by a debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself—over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it, they waive no right of action, and are not executing parties to it."

(*a*) *Wallwyn* v. *Coutts* (1815) 3 Mer. 707 (Lord Eldon); *Garrard* v. *Lord Lauderdale* (1831) 2 Russ. & M. 451 (Lord Brougham); *Acton* v. *Woodgate* (1833) 2 My. & K. 492 (Leach M.R.); *La Touche* v. *Earl of Lucan* (1840) 2 Dr. & Wal. 432 (House of Lords, from Ireland); *Steele* v. *Murphy* (1841) 3 Moo.P.C. 445 (from Jamaica); *Wilding* v. *Richards* (1845) 1 Coll. 655 (Knight Bruce V.-C.); *Biron* v. *Mount* (1857) 24 Beav. 642 (Romilly M.R.); *Lawrence* v. *Campbell* (1859) 7 W.R. 170 (Kindersley V.-C.); *Henriques* v. *Bensuson* (1872) 20 W.R. 350 (Malins V.-C.); *Re Ashby* [1892] 1 Q.B. 872 (Vaughan Williams J.); *Roberts* v. *Jones* (1892) 61 L.J.Q.B. 523 (Divisional Court); *Re Cozens* [1913] 2 Ch. 478 (Neville J.); *Ellis & Co.* v. *Cross* [1915] 2 K.B. 654 (Divisional Court). And see *Page* v. *Broom* (1827) 4 Russ. 6; (1830) 2 Russ. & M. 214 (Lord Brougham); *Smith* v. *Keating* (1848) 6 C.B. 136 (Court of Exchequer Chamber); *R.* v. *Creese* (1874) L.R. 2 C.C.R. 105; *R.* v. *Humphris* [1904] 2 K.B. 89 (Court for Crown Cases Reserved). *Cf. Langton* v. *Tracy* (1670) 2 Chan.Rep. 30 (Bridgman L.K.); *Stephenson* v. *Hayward* (1710) Prec.Ch. 310 (Harcourt L.K.).

(*b*) (1831) 2 Russ. & M. 451, 455.

(*c*) (1815) 3 Mer. 707.

On this view, the trustee is simply the agent of the debtor, authorised to pay the debts, and given the wherewithal to do it. Any principal may vest property in his agent for the purposes of the agency, but that does not make the agent a trustee for the third parties with whom he is authorised to deal on behalf of his principal. So long as the agency has not been exercised to the point of creating legal or equitable rights in the third parties, the granting of the authority does not itself do so, and the agent is a trustee of the property for his principal. This holds good even if the third parties have requested the institution of the agency mechanism. In *Ellis & Co.* v. *Cross* (*e*), a debtor assigned all his property to a trustee on trust for his creditors, but the fact of the assignment was not communicated to any creditors. The arrangement was held revocable by the Divisional Court although it had been entered into in pursuance of a resolution passed by a creditors' meeting.

Most common law countries adopt this attitude. But according to Scott (*f*): "The majority rule in the United States is that an irrevocable trust is immediately created in favour of the creditors."

II. Irrevocable Mandate

Executing creditors

Execution of the trust instrument by any creditor makes the trust irrevocable as against him (*g*). The creditor becomes a *cestui que trust*, and can call upon the trustee to account.

In *Mackinnon* v. *Stewart* (*h*) a debtor conveyed all his property to three creditors on trust to pay all his debts, and the deed was executed by the trustees and thirty-four other creditors. A non-executing creditor wished the trust to be revoked, and the debtor was willing, but Lord Cranworth V.-C., held it irrevocable as against the thirty-seven. He said (*i*):

> "it is abundantly clear on the authorities that, where a creditor is a party to a deed whereby his debtor conveys property to a trustee to be applied in liquidation of the debt due to that creditor, the deed is, as to the creditor, irrevocable. A valid trust is created in his favour; and the relation between the debtor and trustee is no longer that of mere principal and agent. Of course, that which is true where a single creditor is the

(*e*) [1915] 2 K.B. 654.
(*f*) *Law of Trusts* (2nd ed.), Vol. 3, p. 2399.
(*g*) *Mackinnon* v. *Stewart* (1850) 1 Sim(N.S.) 76 (Lord Cranworth V.-C.); *Montefiore* v. *Browne* (1858) 7 H.L.C. 241 (from Ireland); *Lancaster* v. *Elce* (1862) 31 Beav. 325 (Romilly M.R.); *Cosser* v. *Radford* (1863) 1 De G.J. & S. 585 (Court of Appeal in Chancery); *Re Ashby* [1892] 1 Q.B. 872 (*per* Vaughan Williams J., *obiter*).
(*h*) (1850) 1 Sim.(N.S.) 76.
(*i*) 1 Sim.(N.S.) 89–90.

cestui que trust is at least equally so where there are many creditors. Nor does the creditor executing the deed become less a *cestui que trust* because he gives nothing to the debtor as a consideration for the trust created in his favour, or because it was the voluntary, unsolicited act of the debtor to create the trust. I never knew that any question had been raised on this subject as against creditors who had executed the deed and so made themselves *cestuis que trust*."

There is some question-begging here. No one would query the position of creditors who had made themselves *cestuis que trust*: the dispute was whether by executing the deed (without giving consideration) a creditor did become a *cestui que trust*. If there were creditors' covenants in the deed, or if by executing it the creditor released his right to sue at common law, an equity would have to arise. But Lord Cranworth insisted on the efficacy of the ceremony of signature, sealing and delivery.

Creditors who assent or acquiesce

In *Harland* v. *Binks* (*k*) a full Court of Queen's Bench decided that if a creditor assented to a trust for the payment of debts, by indicating to the debtor's attorney that he would rely on the trust and not on the debt, the trust became irrevocable as against that creditor. It is not clear why this should be so if the creditor has not altered his position in pursuance of his assent, but the rule is well settled. What is not settled is whether the creditor can withdraw his assent if the debtor has not relied on it.

Creditors who do not expressly assent but tacitly acquiesce (*e.g.*, by allowing the period of limitation to bar the original debt) in the trust also render it irrevocable as against themselves (*l*). As Romilly M.R. pointed out *obiter* in *Biron* v. *Mount* (*m*), this applies only where the creditor has done some act amounting to acquiescence: some act, presumably, which renders it inequitable to revoke the trust; it is not enough for him to stand by and take no part. But according to an *obiter dictum* of Lord Campbell, giving the judgment of the Court of Queen's Bench in *Siggers* v. *Evans* (*o*), the acquiescence is effective even though the fact of the creditor's concurrence has not been communicated to the debtor. This ought to

(*k*) (1850) 15 Q.B. 713. And see *Lane* v. *Husband* (1845) 14 Sim. 656, 661, *per* Shadwell V.-C.; *Gould* v. *Robertson* (1851) 4 De G. & Sm. 509, 516, *per* Knight Bruce V.-C.; *Lawrence* v. *Campbell* (1859) 7 W.R. 170.

(*l*) *Field* v. *Lord Donoughmore* (1841) 1 Dr. & War. 227 (Sugden L.C., Ireland); *Browne* v. *Cavendish* (1844) 1 Jo. & Lat. 635 (Sugden L.C., Ireland); *Nicholson* v. *Tutin* (1855) 2 K. & J. 18 (Page Wood V.-C.). And see *Mackinnon* v. *Stewart* (1850) 1 Sim.(N.S.) 76, 90, *per* Lord Cranworth V.-C., *obiter*.

(*m*) (1857) 24 Beav. 642, 649–650.

(*o*) (1855) 5 El. & Bl. 367, 377.

be right unless the debtor has prejudiced his position in reliance on his belief in continued revocability.

In *Re Baber's Trusts* (*p*), a non-executing creditor acquiesced in a deed of arrangement by refraining from suing the debtor. He had never seen the deed, though he had corresponded with the trustees about it, and did not know of its provision confining its benefits to creditors who executed it within six months. Malins V.-C. held this creditor entitled to a dividend. On the other hand, it has been held (*q*) that if a creditor claims priority over a deed of arrangement, and that claim is rejected by the court, he cannot afterwards insist on benefiting under the deed. The result would appear to be to leave the creditor remediless. He cannot sue on the trust; if the assignment was of all the debtor's property there is no point in suing on the debt; and it is too late to present a bankruptcy petition on the basis of the deed of arrangement, because an act of bankruptcy, in England, must be relied on within three months (*r*). This is a heavy, and seemingly undeserved, penalty for losing bona fide litigation. Would it be imposed on a creditor who declared at the outset: "I claim priority over the trust, but if I am proved wrong in that respect I propose to rely on the trust in preference to the debt"?

When a creditor does make a trust for the payment of debts irrevocable *quoad* himself by acquiescence, he must perform all the obligations imposed by the deed on an executing creditor (*s*).

A creditor who acquiesces in a trust for paying debts cannot rely on it as an act of bankruptcy (*t*). In *Re Carr* (*u*) an unexplained delay of two months by a creditor after receiving notice of a deed of arrangement was held to be acquiescence for this purpose. Of course, acquiescence induced by misrepresentation will not impede a creditor's employment of an act of bankruptcy to support a petition (*a*).

Creditors hearing the news

Whether the mere fact that a creditor has been told by the debtor or trustee of the existence of a trust for paying debts makes it irrevocable is a question on which there has been much difference of opinion. On principle, once it is agreed that such a trust is

(*p*) (1870) L.R. 10 Eq. 554.

(*q*) *Brandling* v. *Plummer* (1857) 28 L.J.Ch. 188 (Kindersley V.-C.); *Re Meredith* (1885) 29 Ch.D. 745 (Pearson J.).

(*r*) Bankruptcy Act, 1914, s. 4 (1) (c).

(*s*) *Field* v. *Lord Donoughmore* (1841) 1 Dr. & War. 227; *Cheesebrough* v. *Wright* (*No. 2*) (1860) 28 Beav. 283 (Romilly M.R.).

(*t*) *Re Michael* (1891) 8 Morr. 305 (Divisional Court); *Re Hawley* (1897) 76 L.T. 501 (Divisional Court); *Re Woodroff* (1897) 76 L.T. 502 (Divisional Court); *Re Carr* (1901) 85 L.T. 552 (Divisional Court); *Re Day* (1902) 86 L.T. 238 (Divisional Court).

(*u*) (1901) 85 L.T. 552. *Cf. Re Day* (1902) 86 L.T. 238.

(*a*) *Foley* v. *Hoare* (1832) Hayes & Jo. 90; *Re Tanenberg* (1889) 6 Morr. 49 (Divisional Court).

normally a revocable mandate, it should become irrevocable only if revocation is rendered inequitable by some supervening event. Neither communication to a creditor nor execution by him of itself prejudices the creditor's position. Only if he alters his position in reliance on the deed is there some circumstance making revocation inequitable. However, the authorities fly in all directions.

In 1833, in *Acton* v. *Woodgate* (*b*), Leach M.R. regarded it as open, and left it open, whether communication to creditors would end revocability. In 1851, in *Cornthwaite* v. *Frith* (*c*), Knight Bruce V.-C. held that mere communication of the trust did not make it irrevocable. Seven years later, in *Montefiore* v. *Browne* (*d*), a House of Lords appeal from Ireland, Lord Chelmsford and Lord Cranworth both discussed the matter without deciding it. In 1887, in *Admitt* v. *Hands* (*e*), a Divisional Court held that communication removed the power of revocation (thereby, presumably, overruling *Cornthwaite* v. *Frith*). Lord Esher M.R., with whom Lopes L.J. agreed, said (*f*):

> "When a claimant sets up a deed, such as this, against an execution creditor, a deed which assumes to pass the whole of a person's property to trustees for the benefit of his creditor's [*sic*] generally, although he proves that the deed was bona fide, he has not, by that alone, done all that he was bound to do. If that is all he does, he only shows that there is a bona fide intention to distribute his property amongst his creditors, which would be merely an arrangement between him and the trustees, and revocable, and therefore not good as against an execution creditor. He must go a step further, and show that it is irrevocable; and he can show this, by showing that the deed has been communicated to one of the creditors, and not dissented from by him, which would raise the relation of trustee and *cestui que trust*."

Four years later, in *Re Michael* (*g*), another Divisional Court case (but this time concerned with the question of whether a creditor had lost his right to rely on a deed of arrangement as an act of bankruptcy), Vaughan Williams J., with whom Henn Collins J. concurred, said:

> "It is not sufficient that the creditor merely had notice of the deed being executed. You must show that he intentionally took advantage of the deed being executed."

(*b*) (1833) 2 My. & K. 492.
(*c*) 4 De G. & Sm. 552. *Cf. Lilly* v. *Hays* (1836) 5 Ad. & E. 548 (Court of King's Bench).
(*d*) (1858) 7 H.L.C. 241, 259–260, 266.
(*e*) 57 L.T. 370.
(*f*) 57 L.T. 371.
(*g*) (1891) 9 Morr. 305, 310.

Next year, in *Re Ashby* (*h*), Vaughan Williams J. said *obiter* that communication to a creditor made such a deed irrevocable as against him. The learned judge could scarcely have thought that a beneficiary entitled to enforce a trust could choose either to enforce it or to use it as a foundation for a bankruptcy petition. Yet that is the effect of his two *dicta*.

One thing has been settled by the Court of Appeal. In *Henderson* v. *Rothschild* (*i*) they decided that communication to a creditor did not *ipso facto* entitle him to sue where the debt was not due at the time of the communication. The arrangement could be revoked before the debt became due.

Creditor trustee

Where the trustee is a creditor, a deed of arrangement becomes irrevocable as against him—but not as against other creditors (*k*)—as soon as it is communicated to the trustee, unless and until he disclaims (*l*). This is said to be an application of the general principle that assent by a grantee to the grant of property is assumed until the contrary is shown.

Trust not for debtor's convenience

When a trust for paying debts is regarded as a revocable mandate, that is because the trust is regarded as being for the convenience of the debtor, and his trustee holds the property as agent for the benefit of the principal. If it can be shown that in fact the trust was meant for the benefit of creditors and not for the convenience of the debtor, there is no power of revocation (*m*). In *Wilding* v. *Richards* (*n*) the deed was regarded as constituting the creditors *cestuis que trust* because it was not for creditors generally, and was for consideration.

Presumably any probable intention to create a binding trust will operate to do so. The debtor might signify his intention by a clause declaring that his disposition was a binding trust enforceable by creditors, or by declaring that any right of revocation was thereby

(*h*) [1892] 1 Q.B. 872.

(*i*) (1887) 56 L.J.Ch. 471.

(*k*) *Johns* v. *James* (1878) 8 Ch.D. 744 (Court of Appeal).

(*l*) *Wilding* v. *Richards* (1845) 1 Coll. 655; *Siggers* v. *Evans* (1855) 5 El. & Bl. 367; *Hobson* v. *Thelluson* (1867) L.R. 2 Q.B. 642 (Blackburn J.); *Beebee & Co.* v. *Turner's Successors* (1931) 48 T.L.R. 61 (Divisional Court). The deed may, of course, still be attacked as fraudulent: see *Smith* v. *Hurst* (1852) 10 Hare 30 (Turner V.-C.).

(*m*) *Wilding* v. *Richards* (1845) 1 Coll. 655; *New, Prance and Garrard's Trustee* v. *Hunting* [1897] 2 Q.B. 19 (Court of Appeal): no appeal was taken from this ground of the decision, but an appeal on another ground was dismissed by the House of Lords: *Sharp* v. *Jackson* [1899] A.C. 419; *Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society* (1918) 87 L.J.Ch. 557 (Eve J.).

(*n*) (1845) 1 Coll. 655.

excluded, or in any other way. The reservation by the debtor of a limited power to readjust the rights of creditors *inter se* has been treated as evidence against the existence of the wider power of revocation (*o*).

Secrecy by the debtor as to the existence of the trust has been discussed now and again. This has occurred where a trustee, having misappropriated trust property, has secretly executed a document declaring himself trustee of some of his own property to repay the defrauded beneficiaries, and the whole business has come out after his death. In *Re Cozens* (*p*), Neville J. said:

> "In my opinion the absence of communication raises a strong inference against an intention to make an appropriation irrevocable. In the absence of evidence to the contrary I think the inference is that silence was intended to enable the declarant to adhere to or abandon the declaration as best served his advantage for the time being."

In *Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society* (*q*), after referring to that opinion of Neville J., Eve J. said:

> "This may be so occasionally, but, in the generality of cases in which the question arises, I think with all respect very little evidence is required to rebut that inference. The circumstances in which such a document comes into existence are not infrequently such as to impose the necessity of absolute secrecy, if the catastrophe against which they are prepared is still to be postponed and not precipitated; and when these circumstances exist, I do not think any presumption that the document is revocable arises from the fact of its existence not being disclosed to any person. Secrecy is no doubt an element to be taken into account, but it is not one to which in the circumstances here present (*r*) any great weight can, in my opinion, properly be attached" (*s*).

No doubt Eve J. is more realistic than Neville J. as to the reason for the secrecy, but Neville J. is more realistic as to its legal consequences. A person who secretly declares himself a trustee can revoke the trust in fact, simply by tearing up all the documents and keeping up the secrecy.

If a trust for the payment of debts is followed by a trust of the surplus of the trust property for beneficiaries other than the settlor

(*o*) *Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society* (1918) 87 L.J.Ch. 557.
(*p*) [1913] 2 Ch. 478, 486.
(*q*) (1918) 87 L.J.Ch. 557, 559.
(*r*) *i.e.*, a breach of trust and arrangements to repair it.
(*s*) And see *New, Prance and Garrard's Trustee* v. *Hunting* [1897] 2 Q.B. 19.

(whether or not he is included in their number), the creditors are *cestuis que trust* (*t*). It is pretty obvious then that the arrangement is not for the debtor's convenience, and this is presumably the reason.

In *New, Prance and Garrard's Trustee* v. *Hunting* (*u*), Lord Esher M.R. thought that a trust for the payment of particular creditors was necessarily irrevocable. There is, however, no reason why this should be so, and there is no authority for such a proposition. The fact that a trust is for selected creditors, and not for creditors generally, is some evidence that there was an intention to create an enforceable trust, but the matter cannot be put higher than that.

III. Debtor's Death

Once it is established that an operative trust for paying debts is a revocable mandate, the subsequent death of the debtor does not make it irrevocable (*a*). The debtor's personal representative can revoke in the same circumstances as could the debtor. This seems to be an exception to the doctrine that the death of the principal automatically determines an agent's authority.

The position where a trust for the payment of debts is only to come into force on the debtor's death is obscure. There is House of Lords authority in an Irish case, *Synnot* v. *Simpson* (*b*), but it is unsatisfactory. The court below had held such a trust to be irrevocable after the debtor's death, and the House of Lords divided equally (1–1), so that the appeal was dismissed. Lord Cranworth was for dismissing the appeal, but it is not clear whether he appreciated the significance of the fact that it was the remainderman under the trust (*i.e.*, the beneficiary of surplus after paying debts), and not the debtor's personal representative, who sought to set the trust aside. Lord Cranworth said (*c*):

> "I think the circumstances show here that the schedule creditors were objects of the settlor's bounty just as much as John, the son, who took the estate subject to the debts. It may be that the trust for payment of the debts of Francis Synge was during his life a trust which he might vary or revoke at his pleasure. I think it was; still when such revocation became by

(*t*) *Godfrey* v. *Poole* (1888) 13 App.Cas. 497 (from New South Wales). And see *Langton* v. *Tracy* (1670) 2 Chan.Rep. 30 (Bridgman L.K.).

(*u*) [1897] 2 Q.B. 19.

(*a*) *Garrard* v. *Lord Lauderdale* (1831) 2 Russ. & M. 451; *Re Sanders' Trusts* (1878) 47 L.J.Ch. 667 (Malins V.-C.); *Re Cozens* [1913] 2 Ch. 478.

(*b*) (1854) 5 H.L.C. 121.

(*c*) 5 H.L.C. 139.

his death impossible (*d*), I think that John, his son, could only take the estate as it was given to him, that is, subject to the schedule debts, which according to the expressed provision of the deed were to be liens and charges thereon."

Lord St. Leonards, dissenting, thought the trust revocable during the life of Francis and after his death.

The Court of Appeal, in *Re Fitzgerald's Settlement* (*e*), held a trust for payment of debts to arise on the debtor's death to be irrevocable after he died. But it would seem that the court took the view that the creditors in question were *cestuis que trust* from the start, because the trust was for their benefit as well as for the benefit of the debtor's estate, in which case it was presumably irrevocable by the debtor anyway. *Priestley* v. *Ellis* (*f*) resembles the *Fitzgerald* case in every particular.

One argument would be that a trust to arise only on his death could not be for the debtor's convenience, and should therefore be irrevocable. This argument would also apply, however, to a trust *inter vivos* with immediate operation, and would render it irrevocable on the debtor's death: it can no longer be for his convenience. But this is not the law. Besides, a trust for paying debts to take effect on death may be for the debtor's convenience, *e.g.*, it may be designed to secure himself liberty from pressing creditors for the rest of his life.

IV. Effect of Revocable Mandate

Assuming the existence of a revocable trust for paying debts, what is the extent of its operation while unrevoked? The position of the debtor is clear: he can revoke it. There remain for consideration the positions of creditors and of the trustee.

Position of creditors

No creditor as against whom the trust is revocable can sue the trustee to enforce it (*g*). On the other hand, a non-acquiescing creditor (other than an execution creditor) cannot exercise, or insist on the exercise of, the debtor's power of revocation as against another creditor (*h*).

(*d*) Why impossible? And anyway, surely John took the estate as it was given to him even if the trust for paying debts was revocable?

(*e*) (1887) 37 Ch.D. 18.

(*f*) [1897] 1 Ch. 489 (Kekewich J.).

(*g*) *Garrard* v. *Lord Lauderdale* (1831) 2 Russ. & M. 451; *Gibbs* v. *Glamis* (1841) 11 Sim. 584 (Lord Cottenham); *Law* v. *Bagwell* (1843) 4 Dr. & War. 398 (Sugden L.C., Ireland); *Simmonds* v. *Palles* (1845) 2 Jo. & Lat. 489 (Sugden L.C., Ireland); *Henriques* v. *Bensuson* (1872) 20 W.R. 350; *Johns* v. *James* (1878) 8 Ch.D. 744 (Court of Appeal). And see *Smith* v. *Keating* (1848) 6 C.B. 136.

(*h*) *Roberts* v. *Jones* (1892) 61 L.J.Q.B. 523.

Position of trustee

The trustee may exercise all the powers of a trustee, as legal owner of the trust property, as against third parties. For example, he can sue third parties for the purpose of gathering assets in (*i*).

He can also pay the debts of creditors as against whom the trust is revocable, or he can pay funds to the debtor. In effect, from the proprietary point of view, the property concerned is vested in the trustee on trust for the debtor, subject, until the debtor calls for the property, to a power to appoint in favour of creditors so as to override the debtor's interest.

V. Surplus

There are from time to time unlikely cases in which the debtor conveys to the trustee property which is sufficient in value to allow all his debts to be paid in full and leave something over. In the first place, of course, the settlor may have provided for a gift over of the surplus, to himself, creditors, the trustee, or someone else. Secondly, if property is given on trust to pay debts, and nothing is said about the destination of surplus, there is a resulting trust of any surplus actually left. There seems to be no authority for this other than an *obiter dictum* by Lord Hatherley in the Court of Appeal (*k*). Probably it is too obvious to be disputed.

An analogous class of case is that where a debtor conveys property to trustees on trust to divide it amongst his creditors in proportion to the amounts he owes them. Here, the whole fund is divided among the creditors rateably (*l*). There can be no surplus: the trust is to divide the whole. It is not a trust to pay debts.

VI. Debt-Paying Powers in Perspective

Once a trust for paying debts is established as being of the irrevocable type, either *ab initio* or by supervening events, all the authorities treat it as a genuine trust. In other words, the creditor-beneficiaries can all sue for their shares. It is not a so-called trust for a non-charitable purpose, but a trust for persons. There are *cestuis que trust*, and they can enforce it. The peculiarity that each beneficiary's share may be uncertain in amount does not affect the

(*i*) *Glegg* v. *Rees* (1871) L.R. 7 Ch.App. 71 (Court of Appeal in Chancery).

(*k*) In *Green* v. *Wynn* (1869) L.R. 4 Ch.App. 204, 207. See also *Re Rissik* [1936] Ch. 68, where Farwell J. held that where a trust for payment of creditors included provision for a resulting trust of surplus, and there was a surplus, the whole surplus was held on a resulting trust after paying the principal debts, no interest being allowed to creditors in the absence of express provision for it in the trust instrument.

(*l*) *Wild* v. *Banning* (1866) L.R. 2 Eq. 577 (Lord Romilly M.R.); *Smith* v. *Cooke* [1891] A.C. 297 (House of Lords, England).

legal position. The beneficiary is rather akin to a legatee, and the trustee is in effect a living man's executor.

While the trust is revocable, on the other hand, it is also unenforceable, and creditors are not beneficiaries but objects of a power of appointment. The fact that the validity of trusts for paying debts has never been disputed casts further doubt on the doctrine of *Re Astor's Settlement Trusts* (*m*) that trusts for non-charitable purposes cannot generally exist. It is true that under revocable debtors' trusts the debtor is the *cestui que trust*, but then so can the settlor of property on any non-charitable purpose trust be regarded as the *cestui que trust*, subject to a power of appointment. It is also true that a power to pay debts is a power to appoint to creditors: specified people. But then any trust for non-charitable purposes is a power to appoint to people in furtherance of the purpose. This leads one to wondering why debtors' trusts are revocable while other non-charitable purpose trusts, when upheld at all, are regarded as binding. Actually, most honorary trusts are testamentary, so that authority is lacking. But any non-charitable purpose trust set up *inter vivos* would appear to be as much for the settlor's convenience as a trust for paying his debts. Uncertainty aside, Roxburgh J. held the Astor trust void (*n*). Why not revocable? Finally, there is the question of perpetuity. A simple disposition "To T on trust to pay my debts," when of the revocable variety, creates a power which could be exercised more than twenty-one years after the death of the settlor, the last of his creditors and T. The basis on which the rule against perpetuities is complied with is that there is always someone who can put an end to the mechanism and call for the capital.

VII. Legislation

Parliament has narrowed down the area of operation of equity in respect of transfers of property on trust for the payment of debts.

By section 1 of that Act, the Deeds of Arrangement Act, 1914 (*o*), applies to an assignment of property, whether under seal or not,

(a) made by, for or in respect of the affairs of a debtor for the benefit of his creditors generally;

(b) made by, for or in respect of the affairs of a debtor who was

(*m*) [1952] Ch. 534.

(*n*) *Ibid.*

(*o*) Comparative legislation, none of which is identical: Ireland: Deeds of Arrangement Act, 1887, s. 4; Singapore: Bankruptcy Ordinance (1955 revised ed., c. 11), ss. 2 and 20; Federation of Malaya, Malay States: Bankruptcy Enactment (Federated Malay States 1935 revised ed., c. 55), ss. 2 and 19 (i); Federation of Malaya, Penang and Malacca: Bankruptcy Ordinance (Straits Settlement. 1936, revised ed.. c. 45), ss. 2 and 20.

> insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors;
> otherwise than in pursance of the law for the time being in force relating to bankruptcy.

The words " for the benefit of " are ambiguous. It may be that any assignment of property expressed to be on trust for the payment of debts is for the benefit of creditors within the meaning of the section. But if the trust is revocable, it is difficult to see what benefit creditors derive from it. In fact, in deciding that a given trust is revocable, judges often refer to it as being for the debtor's convenience in express contradistinction to a trust for the benefit of creditors.

By section 2 of the 1914 Act (*p*), an assignment within section 1 is void (*q*) unless registered with the registrar appointed for the purpose by the Board of Trade (*r*) within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted within one week after the execution thereof, and unless it bears such ordinary and *ad valorem* stamp as is provided by this Act.

By section 3 (1)—

> " A deed of arrangement, which either is expressed to be (*s*) or is in fact for the benefit of a debtor's creditors generally, shall be void (*t*) unless, before or within twenty-one days after the registration thereof, or within such extended time as the High Court or the court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed may allow, it has received the assent of a majority in number and value of the creditors of the debtor " (*u*).

Assuming that the legislation (*a*) applies to revocable trusts at

(*p*) See, as to Ireland, the 1887 Act, s. 5, which is not identical.

(*q*) But see s. 19 (1), which gives limited protection to trustees making payments under trusts avoided by ss. 2 and 3.

(*r*) The Board of Trade registrar is provided for by the Administration of Justice Act, 1925, s. 22 (1).

(*s*) An assignment *expressed to be* for the benefit of creditors generally is thus governed by s. 3, although it is not, by s. 1, a deed of arrangement to which the Act is expressed to apply. (*t*) See note (*q*), *ante*.

(*u*) Subss. (3) and (4) deal with mode of signifying assent and with the trustee's duty to file a statutory declaration as to requisite assents with the registrar.

(*a*) Other legislation includes the Bankrupty Act, 1914, s. 1, which makes an assignment " for the benefit of " creditors generally an act of bankruptcy (see also ss. 4 and 46 and the Deeds of Arrangement Act, 1914, s. 23); and the Land Charges Act, 1925, ss. 8 and 9 (registration of deeds of arrangement affecting land so as to preserve priority).

all, then a trust to pay debts can be valid, revocable, and unenforceable (*i.e.*, a resulting trust subject to a revocable power of appointment) only in the following cases:—

(1) When it is a trust made by a solvent debtor in favour of specific creditors or classes of creditors.

(2) When it is a trust made by an insolvent debtor in favour of less than three of his creditors.

(3) When it is a trust made by an insolvent debtor for three or more of his creditors but not for his creditors generally, then for seven days, or, if registered, indefinitely thereafter (*b*).

(4) When it is a trust made by any debtor for his creditors generally, then for seven days, or if registered (*c*), then for twenty-one days therefrom, or, if by then assented to by the majority in number and value (*d*), but not by all the creditors (*e*), indefinitely thereafter.

(*b*) If not registered it ceases to be revocable because it becomes void after seven days of existence by virtue of the Deeds of Arrangement Act, 1914, s. 2.

(*c*) See note (*b*), *ante*.

(*d*) If not assented to by the majority of creditors it ceases to be revocable because it becomes void after twenty-one days of registration under s. 3 of the 1914 Act.

(*e*) If assented to by all the creditors it ceases to be revocable because they become *cestuis que trust*.

INTERESTS POSTPONED AFTER MAJORITY (*a*)

By E. O. Walford, ll.d., Solicitor

Some testators think that it is desirable, either upon principle or owing to special circumstances, to defer the control by their children or grandchildren of capital moneys or even of income until they have attained an age exceeding twenty-one. Wills may be found under which the sole provision on this point is that the children or other issue are to take vested interests on attaining the age of (say) twenty-five, no provision being made as to maintenance or as to accumulation of income. If it is the intention of the testator that after the children attain twenty-one, they shall have an absolute right to receive the income of their share, then all is well, as (provided the gift carries the intermediate income) section 31 (1) of the Trustee Act, 1925, expressly provides for such cases in the following manner—

(1) During the infancy of the issue in question the trustees can pay to the parent or guardian of the infant or apply for the infant's maintenance, education or benefit, all or part of the income of the infant's contingent share.

(2) After the infant attains twenty-one, and until he attains a vested interest or dies, the trustees are to pay the whole of the income to him (*b*).

Accumulation Beyond Statutory Period

If, however, the testator (or settlor) does not desire to allow the issue to control the whole of the income of their shares after attaining the age of twenty-one, it will obviously be necessary to insert a special provision in that connection. It is here that care must be taken. It will be recalled that provisions for accumulation of income are invalid (subject to exceptions in respect of accumulations for payment of debts, for raising portions, or of accumulations of the produce of timber or wood) if the period of accumulation exceeds one of four alternative periods, *i.e.*, the grantor's life, twenty-one years from the grantor's death, the minority or respective minorities of any person or persons living or *en ventre sa mère*

(*a*) A form of will postponing vesting until after majority will be found *post*, p. 715.

(*b*) As explained later this can be overridden by an express provision, subject to the L.P.A., 1925, ss. 164–166.

at the death of the grantor, or the minority or respective minorities of any person or persons who would, if of full age, be entitled to the income directed to be accumulated: L.P.A. 1925, s. 164.

If it is directed that accumulation be effected for any longer period (not exceeding the ordinary perpetuity period) then during the period in excess of that permitted by the section, the income is to be paid to the person or persons who would have been entitled to it if the excessive accumulation had not been directed (*c*).

Sometimes the testator or settlor does not make any specific provision as to the particular period which he intends to select. As only one of them can be chosen, the court has to decide in such cases which period the testator or settlor must be deemed to have had in mind. If the direction is to accumulate after the beneficiary has attained twenty-one, then he cannot be deemed to have chosen the fourth period. Similarly, if the direction is in a will the first period (*i.e.*, the testator's life) is out of the question. Again, if no specific period of years is referred to, the second period (*i.e.*, twenty-one years from the testator's death) may be inapplicable. Suppose, however, that the direction is to accumulate so long as any child (whenever born) of a son of the testator is under twenty-one, then although the probability is that neither the testator nor his adviser has had in mind section 164 of the Law of Property Act, 1925, the court must decide at what point of time the direction to accumulate became void, and the most suitable period to select in such a case is the third period, namely, the minority or respective minorities of any person or persons living or *en ventre sa mère* at the death of the testator: see *Re Watts' Will Trusts* (*d*), from which these rules as to choice of period are paraphrased. It will be seen that the construction is necessarily artificial, as the court is not really choosing the period which the testator has selected, but the one which he has infringed, probably having no knowledge of the fact that his direction is partially void. Returning to the case in which there is a direction for accumulation of income until a certain person or certain persons attain the age of twenty-five years, it is clear that the first and second periods are irrelevant, and there is very little to be said for the third period except that the testator has had in mind a period in excess of " the duration of the minority or respective minorities " of a person or persons, although such person or persons might be living at the death of the testator. On the other hand, although the fourth class is confined to those

(*c*) These provisions cannot be varied by any direction in the will or settlement; but see the L.P.A., 1925, ss. 165 and 166.

(*d*) [1936] 2 All E.R. 1562. The result, in the circumstances assumed above, would be that accumulation was permissible so long as any child of the testator's son *living at the death of the testator* was under 21.

who would, if of full age, be entitled to the income directed to be accumulated, that class includes persons *not yet born* at the death of the testator, so that accumulation during the minority of such a person would be lawful: *Cattell* v. *Cattell* (*e*).

Hence, where the persons are to take vested interests at twenty-five, and accumulation is directed for a period beyond the date when the age of twenty-one is reached, and the persons in question may not be alive at the testator's death, the fourth period would be appropriate. But at this stage we have arrived at a mare's nest, for reasons next discussed.

Perpetuities

The statutory provisions as to accumulation in no way affect the rule against perpetuities. If there is a mere infringement of section 164 of the Law of Property Act, 1925, as to accumulation of income, the period is merely cut down so as to fall within such one of the permitted periods as is most appropriate, having regard to the terms of the will or settlement. If, however, the direction is to accumulate for a period which will or may exceed the perpetuity period, then the direction as to accumulation is absolutely void: *Smith* v. *Cunninghame* (*f*), *Boughton* v. *James* (*g*).

Moreover, in the case supposed, where persons, some of whom are not necessarily born at the death of the testator or settlor, and who are not to take vested interests until they attain twenty-five, the gift (unless taking effect as a *legal* contingent remainder) would have been void if contained in a will or settlement executed before January 1, 1926. Now, by virtue of section 163 of the Law of Property Act, 1925 (which applies only to instruments coming into operation after 1925), the age of twenty-five is automatically cut down to twenty-one so far as concerns the vesting of the interests in the beneficiaries, and thus the gift is valid.

Direction to Accumulate

What of a direction to accumulate the income until the beneficiaries attain twenty-five in such cases? (*h*) It is here that the mare's nest is found. Even if there is a purported gift over in the event of the beneficiaries dying under twenty-five, it is rendered nugatory by section 163 of the Law of Property Act, 1925. Hence, when the beneficiaries attain twenty-one, they are absolutely entitled, and no direction to accumulate could in any event be

(*e*) [1914] 1 Ch. 177.
(*f*) (1884) 13 L.R.Ir. 480.
(*g*) (1844) 1 Coll. 26.
(*h*) We are still assuming that the gift infringed the perpetuity rule but was saved by the L.P.A., 1925, s. 163.

effective: *Saunders* v. *Vautier* (*i*), *Wharton* v. *Masterman* (*j*). Of course, if the beneficiaries are all living at the date of the testator's death or of the settlement, there is nothing to prevent the suspension of vesting until they attain twenty-five or any later age, the property being given to others if the beneficiaries die under twenty-five. The point is that section 163 of the Law of Property Act, 1925, applies only where the deferment of vesting until an age exceeding twenty-one years would otherwise render the gift void for remoteness.

Vesting of Capital and Income Deferred

The testator may wish to defer the vesting of the capital in his sons and also to prevent them from controlling the income until they attain twenty-five, or even a later age. The extent to which he can achieve the latter object must depend on whether they will attain the age of twenty-five (or the later age selected) within twenty-one years after his death: L.P.A., 1925, s. 164.

Provided that the provisions are confined to grandchildren born before the death of the testator, he can also defer the vesting in them of capital and their right to receive the income to the same extent: *Re Watts' Will Trusts* (*k*).

Assuming that the testator is so minded, what steps would be necessary? Reference was made at the beginning of this article to section 31 (1) of the Trustee Act, 1925, under which a person whose interest is contingent upon attaining an age exceeding twenty-one (or upon any other event) and who has attained twenty-one is to receive the whole of the income of the property in which he has that contingent interest. It was at one time thought that the last-mentioned subsection was incapable of variation by a settlor or testator. It was, however, established in *Re Turner's Will Trusts* (*l*) that the subsection applied only in the absence of a contrary direction. As to any such contrary direction, however, it will have been observed that where the beneficiaries do not attain the specified age within one of the permitted periods, accumulation must stop short of the vesting of the capital, and the beneficiaries can then insist, whatever the settlor or testator has stated, upon receiving the whole of the income.

Appropriate Provisions

Accordingly, if we assume that a testator's intention is to effect deferment along these lines, it can be effected in accordance with the form at p. 715, *post*.

(*i*) (1841) 4 Beav. 115.
(*j*) [1895] A.C. 186.
(*k*) See p. 294, *ante*.
(*l*) [1936] 2 All E.R. 1435.

Somewhat similar provisions were contained in the will which was before the court in *Re Turner's Will Trusts* (*m*). The headnote to that case might give the incorrect impression that income could be accumulated until all beneficiaries had attained twenty-five, as it omits any reference to the proviso in the will limiting accumulations to a period of twenty-one years from the testator's death, in order to comply with section 164 of the Law of Property Act, 1925. A provision which is sometimes overlooked is section 165 of the Law of Property Act, 1925. It is not necessary to set out that section in full here; but its effect is that if there is a direction for accumulation for one of the periods mentioned in section 164, but when that period ends a beneficiary is still under twenty-one, accumulation can nevertheless continue until the beneficiary attains twenty-one, unless, of course, the trust for the beneficiary contravenes the perpetuity rule. The effect is that where the gift is to infants on attaining twenty-one, and they may be born after the testator dies, accumulation can continue beyond twenty-one years from the death of the testator despite section 164 of the Law of Property Act, 1925, even though the testator has only provided for accumulation for twenty-one years: *Re Maber* (*n*), and see *Re Cattell* (*o*).

One of the points which arose in the very recent case of *Re Ransomes' Will Trusts* (*p*) was as to the effect of an invalid direction to accumulate income until the youngest of a class of children attains twenty-one, which is of course quite different from a direction to accumulate the income of the share of a particular child during the minority of that child or even during the respective minorities of persons who would be entitled to the income directed to be accumulated if of full age. In such cases, *e.g.*, where each member of the class is entitled to the income of his or her share upon attaining twenty-one (as distinct from waiting until every member of the class has attained twenty-one or died), the direction is valid: see section 164 (1) (d) of the Law of Property Act, 1925. In *Ransomes'* case (*q*) the accumulation was to continue until all the children, whenever born, of his grandson had attained twenty-one. Upjohn J. decided that whilst it was impossible to say which of the alternative periods of accumulation permitted by section 164 of the Law of Property Act, 1925, the testator would have selected if he had known that his own provision was invalid, paragraph (b) of subsection (1) of that section must be deemed to apply, *i.e.*, a period of twenty-one

(*m*) *Ante.*
(*n*) [1928] Ch. 88.
(*o*) [1907] 1 Ch. 567.
(*p*) [1957] 2 W.L.R. 556; [1957] 1 All E.R. 690.
(*q*) *Ante.*

years from the testator's death. It should be noted that in the instant case the fund and accumulations of income were to go to the children in question who were living when the youngest of them obtained twenty-one. Children whenever born were included, so that some children might be considerably over twenty-one before the period of accumulation specified in the will would have expired. Therefore the period mentioned in paragraph (d) of subsection (1) of the section was not applicable. In other words the direction to accumulate did not relate only to the respective minorities of persons who would, if of full age, be entitled to the income directed to be accumulated, and was therefore not within the paragraph last mentioned.

ALTERNATIVE ACCOMMODATION

By John Montgomerie, Barrister-at-Law

If the landlord of rent-controlled property wishes to get possession and cannot bring his case within one of the grounds contained in the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, he must offer suitable alternative accommodation. He may produce the certificate of the housing authority for the area in which the house is situated certifying that that authority will provide suitable alternative accommodation by a specified date. Otherwise the alternative accommodation must either be a controlled dwelling-house or premises to be let on terms which will afford to the tenant security of tenure reasonably equivalent to the security given by the Acts (1933 Act, s. 3 (2) (3)).

It is so rare for a landlord to be able to produce a certificate from the housing authority that that possibility can generally be regarded as negligible. The Rent Act, 1957, as will be seen, now virtually precludes the offer of a controlled house which has been the normal solution to date. It will be necessary, therefore, for the landlord in future to offer security "reasonably equivalent" to Rent Act security of tenure. The aim of this article is to consider the new situation which has thus arisen.

Section 11 (2) of the Rent Act, 1957, provides that the Rent Acts shall not apply to a tenancy created by a lease or agreement coming into operation at or after the commencement of the Act. There is a proviso to the effect that the subsection does not apply where the person to whom the tenancy is granted was, immediately before the granting, the tenant under a controlled tenancy and the premises comprised in one of the tenancies are the same as, or consist of, or include part of the premises comprised in the other. Thus, if the alternative accommodation consists, as sometimes happens, of part of the existing accommodation, the landlord will be offering a controlled tenancy.

It is possible also that the landlord could offer a controlled tenancy as alternative accommodation by making use of the rather extraordinary provisions of section 17 of the Rent Act, 1957. That section, entitled "Provisions to facilitate exchange of controlled dwellings" enables an existing tenant under a statutory tenancy to agree with a person proposing to occupy the house that the

latter shall take over his statutory tenancy. The landlord must be a party to such an agreement and this requirement is likely in ordinary cases to make the section virtually useless. For it will not often happen that when a statutory tenant is thinking of vacating his dwelling-house, the landlord will agree to let another one in in his place, especially since any new letting outside the section would be free from control. But if a landlord owns two controlled houses, A and B, and the tenant of A is thinking of moving, the landlord may wish to transfer the tenant of B to A in order to sell or occupy B. If he and the outgoing tenant of A joined to offer the tenant of B an agreement under section 17, this would be the offer of a controlled dwelling as alternative accommodation. Under subsection (1), if the tenant of A has succeeded to the statutory tenancy on the death of a previous statutory tenant, there will be no right of succession on the death of the tenant of B if he takes over the statutory tenancy of A. This circumstance might cause the court to hold that it was not reasonable to make an order for possession but by subsection (3) the agreement may provide that a succession shall be capable of having effect in the event of the death of the incoming tenant notwithstanding that the outgoing tenant was the successor to a statutory tenancy. It is assumed that the outgoing tenant is a statutory tenant. If he is a contractual tenant an assignment with the landlord's consent will suffice. No payment can be exacted for a transaction under this section except that the outgoing tenant can require payment of apportioned outgoings, recoupment on improvements, or a reasonable sum for goodwill if a business is transferred with the premises. A suggested form of agreement for an exchange of statutory tenancy which can be offered to a tenant by way of alternative accommodation is given at *post*, p. 725.

Apart from the foregoing possibilities, the landlord must offer a tenancy which will give "reasonably equivalent" security of tenure. An ordinary periodic tenancy is obviously not enough. Even if the landlord of the new premises is a local authority, which can normally be trusted not to act arbitrarily, the requirements of the Acts are not satisfied by a weekly tenancy: *Sills* v. *Watkins* (*a*). The security must be afforded by the terms of the tenancy, not merely the circumstances in which it is granted.

A tenancy for a fixed period of sufficient length will satisfy the requirements of the Acts. But it is very difficult to judge what length should be offered. The probable length of a statutory

(*a*) [1956] 1 Q.B. 250.

tenancy depends on many factors, *e.g.*, the age and health of the tenant, the likelihood of his moving for business or other reasons and the possibility of a succession on his death. It is doubtful too, how far the courts are entitled to speculate on the future of the Rent Acts while the Conservatives hold out the prospect of further measures of decontrol and the Socialists threaten municipalisation. It is suggested, therefore, that instead of offering a tenancy for a fixed period the landlord might offer a tenancy containing terms such that the tenant's rights are assimilated to those of a statutory tenant. To give the tenant by a conveyance the exact status of a statutory tenant is probably a task beyond the wit of man. For a statutory tenancy has been described as "a new *monstrum horrendum, informe, ingens*": *Marcroft Wagons, Ltd.* v. *Smith* (*b*). It confers no interest whatever in land but only a "status of immovability." But although it has been said that the parties cannot by agreement oust or reduce the jurisdiction of the court to make orders for possession (*c*) there would seem to be no reason why parties should not agree to a contractual uncontrolled tenancy under which the landlord is disabled from terminating the tenancy unless conditions exist such that the court would have made an order had the premises been controlled. Thus the agreement might provide that so long as the tenant or his widow or other relative was residing on the premises the landlord would not seek possession unless either the "ceiling" of the Rent Acts had been lowered so as to decontrol houses of the rateable value of that offered as alternative accommodation or one of the grounds of possession under the Rent Acts had been satisfied and the circumstances were such that the court would consider it reasonable to make the order.

If the rent to be charged is an inclusive one it will be necessary to provide for variation with fluctuations in the rates. It is impracticable to import the fantastic provisions of the First Schedule to the Act as regards abatement for disrepair but the landlord might reasonably be made expressly liable for repairs other than internal decorative repairs and defects which are the "tenant's responsibility" as defined in the Rent Act, 1957, Sched. 1, para. 15. The tenant in return could be made responsible for the excepted repairs and each party could be left to old-fashioned and simple remedies.

A form of such a tenancy agreement is printed at *post*, p. 726.

(*b*) [1951] 2 K.B. 492, *per* Evershed M.R., at p. 501.
(*c*) *Rogers* v. *Hyde* [1951] 2 K.B. 923 at p. 931.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

British Transport Commission v. *Westmorland County Council*; *Same* v. *Worcestershire County Council* [1957] 2 W.L.R. 1032; [1957] 2 All E.R. 353 (H.L.)

Public right of way—dedication—powers of statutory body—compatibility with purposes of acquisition.—The House of Lords (Viscount Simonds, Lords Morton of Henryton, Radcliffe, Cohen and Keith of Avonholm) has finally and unanimously affirmed the unanimous decisions of the Court of Appeal and the Divisional Court (noted *ante,* Vol. 20, at pp. 241 and 162 respectively). Few cases, perhaps, have come before a total of eleven judges in three courts without a dissentient voice. The result is to establish beyond doubt that under the present law a body such as a railway company may dedicate land for use as a public highway provided such dedication is not incompatible with the statutory purposes for which the company exists. The House, after accepting the above principle, laid down in *R.* v. *Inhabitants of Leake* (1833) 5 B. & Ad. 469, went on to hold that the prospect of incompatibility must be judged in terms of reasonable probability rather than remote possibility. Lord Simonds said " For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. . . . But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired " ([1957] 2 W.L.R., at pp. 1040, 1041; [1957] 2 All E.R., at p. 359).

The various authorities on the matter were thoroughly reviewed in their Lordships' opinions, one such case being *Mulliner* v. *Midland Ry.* (1879) 11 Ch.D. 611, where Jessel M.R. had stated that a railway company was incapable of granting an easement or public right of way except with a view to the traffic of their railway. Lord Radcliffe analysed the subsequent references to this case in detail, and after commenting " how flickering is the illumination which these authorities throw on the main principle of law " concluded by saying " It seems to me better to say baldly that on this occasion a great judge laid down a proposition of law in terms that are too comprehensive to be

maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion" ([1957] 2 W.L.R., at p. 1049; [1957] 2 All E.R., at p. 365).

This case, it will be remembered, arose by way of challenge to a draft map prepared under the National Parks and Access to the Countryside Act, 1949. In the result the House of Lords has presumably preserved numerous rights of way. It is to be hoped legislation will not be introduced to reverse the decision. Nationalised railways, it is submitted, can well afford this comparatively small extra service to the public.

Davey v. *Harrow Corporation* [1957] 2 W.L.R. 941; [1957] 2 All E.R. 305 (C.A.)

Boundaries—plan based on Ordnance Survey map—line denoting centre line of hedge—judicial notice.—This action for nuisance caused by the encroachment of the roots of trees involved the determination of a boundary. In delivering the reserved judgment of the Court of Appeal (Lord Goddard C.J., Jenkins and Morris L.JJ.) Lord Goddard C.J. said " . . . the parcels conveyed are always described by reference to the ordnance survey. . . . The boundary to the south is delineated on the map by a line, and the evidence of an official from the Ordnance Survey Office given before us, but not in the court below, was that the line indicated the centre of the existing hedge. This is in accordance with the invariable practice of the survey as was proved in *Fisher* v. *Winch* [1939] 1 K.B. 666, and in our opinion, after that case and this, courts in future can take notice of this practice of the Ordnance Survey as at least prima facie evidence of what a line on the map indicates" ([1957] 2 W.L.R., at p. 944; [1957] 2 W.L.R., at p. 307). This ruling will become increasingly important with the further spread of registration of title, because the plan or map describing the land must always be based on the ordnance map (Land Registration Act, 1925, s. 76; Land Registration Rules, 1925, r. 272).

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Waite's Settlement Trusts [1957] 1 All E.R. 629 noted *ante*, p. 233 is now also reported at [1957] 2 W.L.R. 1024.

Re Eden (*deceased*) [1957] 1 W.L.R. 788; [1957] 2 All E.R. 430 (Ch.D.)

Trusts—certainty of objects—wide class of proposed beneficiaries—evidence and inquiries necessary.—" A trust for such members of a given class of objects as the trustees shall select is void for uncertainty unless the whole range of objects is ascertained or capable

of ascertainment" (*C. I. R.* v. *Broadway Cottages Trust* [1955] Ch. 20, *per* Jenkins L.J., at p. 35). Would-be trusts failed in that case because the impossibility of ascertainment was conceded, and in *Re Sayer* [1957] 2 W.L.R. 261; [1956] 3 All E.R. 600 because evidence of impossibility was accepted. On the other hand, trusts were upheld in *Re Ogden* [1933] Ch. 678 because the late Sir Herbert Samuel affirmed that he could ascertain all political organisations supporting Liberal principles, and in *Re Hooper's 1949 Settlement* (1955) 34 A.T.C. 3 because impossibility of ascertainment was not shown. The latter decision by Danckwerts J. was particularly relied upon by Wynn-Parry J. in the present case. A testator who died in 1909 left part of his residue to trustees to divide at their discretion among persons who should, at the date of his wife's death, be employed or have been employed by a named company, or in the service of the testator or his wife, or the wives or children of such persons. The wife died in 1936. The trustees had ascertained some objects but had not made exhaustive inquiries. Wynn-Parry J. held the trust valid saying he had to see if the evidence "demonstrates beyond a peradventure that it is impossible to ascertain the range of objects" ([1957] 1 W.L.R., at p. 795; [1957] 2 All E.R., at p. 235). He added that the expense of inquiries even if it consumed the whole trust fund (here some £7,000) would not of itself constitute a reason why appropriate inquiries, including advertisements, should not be undertaken.

In all cases of this type the question of certainty must ultimately turn on the facts, normally disclosed by affidavit. Nevertheless, the principle stated at the beginning of this note lays the onus of proving certainty on those who assert the validity of a trust. In *Re Hooper's 1949 Settlement* and the present case, however, the judges appear to have taken the view that a trust is valid unless uncertainty of objects can be proved. This seems close to requiring the traditionally impossible proof of a negative, and, with respect, it is submitted that such a change of approach is undesirable. Trustees may be put in the awkward position of either treating some of the objects as all the objects, or of dissipating substantial trusts funds in determining this question of certainty. The law should not produce such a result. Admittedly it is generally desirable to uphold near-charitable gifts of this sort, but not, it is respectfully submitted, at the cost of blurring the certainties which must be present to constitute a trust. Moreover, the desired result can be readily attained by use of powers of appointment instead of trusts, for then it will only be necessary to be certain that a particular proposed appointee is an object of the power (*Re Gestetner* [1953] Ch. 672).

Re Edwards (deceased) [1957] 3 W.L.R. 131; [1957] 2 All E.R. 495 (C.A.)

Election—gift by will of testatrix's own property—subsequent disposition inter vivos by testatrix—ademption not election.—The Court of Appeal (Jenkins, Romer and Sellers L.JJ.) has reversed the decision of Upjohn J. (noted *ante*, p. 70). The result now is

that if A makes a will giving specific property to B and other benefits to C, and subsequently transfers the specific property to C, then the devise to B is adeemed and on A's death C is not put to election. Jenkins L.J., who delivered the principal judgment, said that, when the testatrix in this case became during her lifetime bare trustee for one beneficiary of property specifically devised to another, the effect was to revoke the specific gift and to take it out of the will (citing Jarman on *Wills*, 8th ed., Vol. II, pp. 1136, 1137). Consequently, there was no longer any attempted testamentary gift by the testatrix of property belonging to another, and the first condition necessary to raise a case of election was not fulfilled. These conditions were summarised by Jenkins L.J., after reviewing the authorities relied on in the court below, as follows: "the essentials of election are that there should be an intention on the part of the testator or testatrix to dispose of certain property; secondly, that the property should not in fact be the testator's or testatrix's own property; and thirdly, that a benefit should be given by the will to the true owner of the property" ([1957] 3 W.L.R., at p. 135; [1957] 2 All E.R., at p. 499). Jenkins and Romer L.JJ. emphasised that section 24 of the Wills Act, 1837, did not preclude consideration either of circumstances existing at the making of the will, or of events between the will and death.

It is thought that this restriction of the doctrine of election to its earlier limits will be generally welcomed. Otherwise, as Sellers L.J. here remarked, the application of the doctrine would call for further consideration as a matter of equity. It is, of course, still true to say a will speaks from death, but the doctrine of ademption prevents it speaking at all about the property originally comprised in the adeemed gift.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Knight; *Re Wynn* [1957] 2 W.L.R. 987; [1957] 2 All E.R. 252 (C.A.)

Special power — exercise — construction — general language insufficient.—Before a will can be treated as exercising a special power of appointment there must be language in the will which makes such an intention clear. It will not be presumed, or gathered from general words. In the case of the statutory power to dispose of entailed property, under section 176 of the Law of Property Act, 1925, the legislature has indicated what sort of references are required. In the case of special powers of appointment there is a mass of case law, but it is constantly emphasised that each will must be construed by itself, and binding precedents must not be expected. The lesson for the draftsman is clear; if it is intended to exercise a special power some clear reference to the power is desirable, and Lord Evershed has

suggested terms like those in section 176, *viz.*, a reference to the particular property subject to the power or a reference to the instrument conferring the power. In the instant case the proceeds of sale of residuary estate were left on trust for children of the testatrix. The donor of the power died in 1919, and the testatrix had exercised the power over part of the fund in 1921. In 1951, she made a will and died in 1955. She left residue expressed to include "*any* property over which I *may have any power of disposition* at the date of my death." This was held not to exercise the special power. Lord Evershed, delivering the judgment of the court, emphasised the following factors: (1) the vagueness of reference, hardly consistent with the testatrix' familiarity with the power, which she had already exercised before; (2) the use of the word "my estate" and the vagueness of the word "disposition" which was more appropriate to dealing with one's own property than to appointing another's; (3) the vagueness of the word "any": the words "power—if any" are like the words "property—if any" in *Re Slack* [1923] 2 Ch. 539. The learned Master of the Rolls rejected three other factors as inconclusive: (1) the fact that the legatees happened also to be the objects of the power—this might often happen in family settlements and wills; (2) the fact that there was a direction to pay debts, as there were cases either way; such a direction might be interpreted as limited to the free estate passing under a general bequest; (3) the rather circuitous argument that, because section 24 of the Wills Act automatically exercised general powers, any express reference to exercising powers must refer to special powers. It was held that this was a *non sequitur*; the terms of a general power might well require some express reference to be made in the appointment (or the draftsman might well wish to be doubly sure that the power was exercised).

(Theobald 234)

Re Kilvert [1957] 2 W.L.R. 854; [1957] 2 All E.R. 196

Saving from uncertainty—construction as intestate successors—limited effect.—The principle applied by Roxburgh J. in the present case is well established, but some particular problems were added. The rule is that a gift to a vague class of relations or kin is construed as a gift to those persons who would take on the death of the testator intestate, but not necessarily in the proportions or on the terms laid down in the statutes on intestacy. The statute is used for "identification" but not to "dictate machinery." There is another rule, that, under section 132 of the Law of Property Act, 1925, real or personal property which is devised or bequeathed to an "heir" is treated as passing to the person who at the testator's death would have been the heir under the old law of inheritance of real estate, had that law not been changed in 1925, and this applies to new deaths after 1925. Section 51 (1) of the Administration of Estates Act, 1925, saves the right of any person to take property as heir by purchase. In the instant case residue was bequeathed to be equally divided among certain brothers and sisters "or their heirs and successors." The

summons was limited to the relative rights of successors to a brother who predeceased the testator, leaving a widow and children. The court held that this was not a gift to an heir as purchaser and that the old law of inheritance had no application. The possibility that the real and personal estate might devolve separately occurred to the court but was rejected. The new law of intestate succession was boldly applied instead. It was also held, following authority, *e.g.*, *Re Gansloser* [1952] Ch. 30 (C.A.) that the members of this class of intestate successors took jointly and not in equal shares as they would have under the statute. The original direction to divide was held exhausted by its original application to the first generation, the brothers and sisters, a familiar but rather technical rule. The "heirs and successors" were construed in a legal, representative character, not as a further reference to blood relationship. The result is convenient but such hybrid terms as used in this case are obviously better avoided in drafting wills.

(Theobald 307)

Re Gough [1957] 2 W.L.R. 961; [1957] 2 All E.R. 193

Rule in Howe v. *Dartmouth—long leases—change since* 1925.—The decision in the present case has rather an interesting history. Before 1926 the courts held that leases were wasting investments, though there was some doubt about the longer leases. Where leaseholds were subject to an express or a statutory trust for sale it was held that section 28 (2) of the Law of Property Act, 1925, excluded the rule in *Howe* v. *Lord Dartmouth,* in expressly directing rent of all land, including by definition leaseholds, to be treated as if it were the income of the proceeds of sale (*Re Berton* [1939] Ch. 200). The position as to settled land was less clear, and this was not helped by the possibility of treating the rule in *Howe* v. *Lord Dartmouth* as requiring a sale, and so imposing a trust for sale by a side-wind. However, it was noticed by a learned correspondent to the *Conveyancer* in 1942 (6 *Conveyancer* (N.S.) 155) that leases for sixty years or over were authorised investments of capital money under the Settled Land Act and Mr. Bailey, now Professor Bailey, agreed that it was now hardly possible to impose a duty to sell an authorised investment. Theobald on *Wills* refers to this view, and it is certainly the view now adopted by Vaisey J. Residue in this case was settled by will on X for life, with remainder to Y or her issue for their lives, and then to St. Dunstan's. The testator died in 1953. His residue included a leasehold which then had sixty-five years to run. X and Y died in 1954 and 1953 respectively. Y left two infant children. The learned judge held that there was no duty to convert any such lease. Besides the argument based on section 73 of the Settled Land Act there was a strong indication in a reference to "my property" passing on the deaths, which suggested retention of the lease *in specie,* and a less cogent indication in the express power to sell some freehold land without any similar reference to a possible sale of the lease. Where a lease is under sixty years the law is still in doubt, and we are faced with the dilemma of imposing a duty to sell, and then turning round

and excluding the rule under section 28 (2) of the Law of Property Act. It will be interesting to see what the courts will in due course make of such a game of snakes and ladders.

(Theobald 457, 459)

Re Whitrick [1957] 2 All E.R. 467 (C.A.)

Will—casus omissus—words supplied to satisfy necessary implication.—Why the draftsman adopted the form of words he did in this case is quite a mystery; possibly some prior clause was left out and a less important rider preserved. An elderly couple made wills in each other's favour. It was no doubt, in the court's view, their intention to benefit each other if possible, and to give their estates to certain legatees if the other spouse were already dead. But instead of providing for such lapse the wills both provided for a gift to the legatees if the two spouses died *at the same time*. As both wills were identical in effect this clause seems peculiarly inapt. In fact the husband died some time before the wife. The Court of Appeal held that they were satisfied that the will was incomplete and that they were equally satisfied what had been omitted. They therefore supplied words to pass the estate to the legatees in the event of the husband's predecease, which had happened. It was pointed out that Vaisey J. had supplied an absolute gift to a husband in *Re Smith* [1948] Ch. 49 where a testatrix provided for the event of her husband dying within a month of her death but failed to deal with the eventuality of a longer survival. There is no quarrel with the result in this present case; the eventuality was the failure of the one spouse to survive the other, and the limitation to a case of *commorientes* was so peculiar as to be safely ignored.

(Theobald 643)

Re Hatfeild's Will Trusts [1957] 3 W.L.R. 28; [1957] 2 All E.R. 261

Disclaimer — acceleration — intermediate income — divesting.—In *Re Scott* [1911] 2 Ch. 374 Warrington J. held that no remainder in a devise of freehold land could take effect in favour of an ultimate remainderman if there was an intermediate estate which could spring up and take effect, and that the income had to be treated as undisposed of in the interim. The problem was complicated by reference to the old law of trustees to preserve contingent remainders and by differences between legal and equitable limitations. Younger L.J., as he then was, doubted this hard solution, in *Re Brooke* [1923] 2 Ch. 265 (C.A.). He saw no difficulty in treating the ultimate gift as subject to an executory limitation in favour of the contingent intermediate gift. In the instant case freeholds were devised to H for life, then to A for life, then to A's sons successively in tail male, and then to C in fee simple. The testator died in 1941 and H died in April, 1950.

In August, 1950, A disclaimed his life interest, and the question arose whether C's interest was accelerated. Disclaimer can clearly work an acceleration of a later interest, and it was held by Harman J. to have done so. He did not share the doubts expressed in *Re Scott* (*ante*). The ultimate remainder could thus vest, subject to divesting on the birth of a son to A, when it would recede into the background, ready to revest on failure of the line of the entail. He rejected the argument that the income during the life of A or until A had a son was attached to the contingent entail under section 175 of the Law of Property Act, 1925, and so subject to accumulation, and not available to the ultimate remainderman, holding that the testator had (objectively) " expressly disposed " of that income by creating a settlement which attracted the application of the law of acceleration. " There is no gap into which the provisions of section 175 of the Law of Property Act can intrude." This case is certainly an example of very artificial reasoning, but, once the last interest is treated as earlier than the intermediate interest—and this is not a novel conception—the difficulty disappears. On the other hand, there is an element of circuitous reasoning involved in treating one result as the reason for not allowing another, equally possible, result.

(Theobald 167, 680)

Re Hayward [1957] 3 W.L.R. 50; [1957] 2 All E.R. 474 (C.A.)

Intestacy — hotchpot — advancement — Administration of Estates Act, 1925, *s.* 47 (1) (*ii*), (*iii*).—The Court of Appeal have affirmed the decision already noted at p. 74, *ante*, and reported in [1956] 1 W.L.R. 1490; [1956] 2 All E.R. 474. A gift of £500 to a middle-aged married son, with no evidence of purpose, was held too small to be an advancement, and therefore not required to be brought into account on intestacy. The relative fraction of the estate represented by a gift was not the test; otherwise a gift of £5 might be an advancement if the total estate was worth £10. The case is interesting for a full examination by Jenkins L.J. (53 *et seq.*) of all the cases. The learned Lord Justice points out the slight difference between the " estates by settlement or advancement by portions " of the Statutes of Distribution, 1670, and the reference in section 47 of the Administration of Estates Act, 1925, to money paid to a child, or property settled for the benefit of a child, by way of advancement or on marriage. Under both statutes he considered that " advancement " referred to setting a child up in life. It is clear that a gift of £500 cannot have that effect at the present day.

(Williams on *Executors* 911)

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Scene Estate, Ltd. v. *Amos* [1957] 2 W.L.R. 1017; [1957] 2 All E.R. 325 (C.A.)

Agricultural Holdings Act, 1948—*letting of land for grazing purposes only for period of three months—subsequent successive agreements for like periods—contemplation of parties.*—The decision in this case turned upon the meaning of the word " contemplation " in the proviso to section 2 (1) of the Agricultural Holdings Act, 1948, which excludes from the operation of the Act " an agreement for the letting of land or the granting of a licence to occupy land made (whether or not the agreement so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year."

In January, 1950, the landlords agreed to let and the tenant agreed " to take the right to use for grazing purposes only and not otherwise " certain land for a period of three months. At the time of this agreement both parties thought that it would be renewed, and it was in fact renewed for successive periods of three months at a time till April, 1955, when the landlords, relying on the proviso to section 2 (1) of the Act, claimed possession. The tenant contended that since the parties had " contemplated " from the beginning that the letting would last for at least a year, the proviso did not apply. The Court of Appeal decided unanimously in favour of the landlords. " Contemplation " means more than expectation. In the opinion of Denning L.J. the object of the word " contemplation " in the proviso is (1) to protect a landlord who has not expressly inserted a provision that the letting is for grazing only, or for mowing only, or that it is for a specified part of the year, although both parties know that that is what is contemplated, and (2) to cover the case of a sham agreement, where, despite express words, the parties intend a different state of affairs. Apart from these cases, in his view, the court should be guided by the terms of the agreement, express or implied, and by nothing else. Parker L.J. considered it clear that (1) " specified period of the year " means " specified part of the year " (see *Reid* v. *Dawson* [1955] 1 Q.B. 214); (2) the contemplation must be not only (a) that the use of the land shall be only for grazing or mowing, but also (b) that the period of the use shall only be one of less than a year; (3) the contemplation must be mutual; (4) the contemplation must be judged at the beginning of the agreement or of each successive agreement; and (5) the words " (whether or not the agreement expressly provides) " show that it is permissible in certain circumstances to go outside the agreement and see what the " contemplation " was from extrinsic evidence. But he agreed with Denning L.J. that if an agreement is express on a subject, one cannot look outside it except to show that the agreement is a complete sham. He also expressed the view that an agreement is not made in contemplation of something being done under it, unless there was power and obligation to do that very thing. Here there was no power in the tenant to stay

and no obligation on the landlord to allow him to stay for more than three months at a time. Sellers L.J. agreed with both judgments.

Addiscombe Garden Estates, Ltd. v. *Crabbe*
[1957] 2 W.L.R. 964; [1957] 2 All E.R. 205

Landlord and Tenant Act, 1954—*business premises*—"*business*" —*members' club.*—Premises let for the purposes of a members' lawn tennis club have been held to be premises to which Part II of the Landlord and Tenant Act, 1954, applies. By a written agreement made in April, 1954, the plaintiff company, the owners of an hotel, tennis courts and a clubhouse purported to "license and authorise" the trustees of the club to enter upon, use and enjoy the clubhouse and tennis courts in consideration of court fees payable monthly "to the hotel" for a period of two years. Upon the expiration of this period the trustees and the club members continued to use the premises without any further agreement, and the plaintiffs brought an action for trespass and dispossession. Hilbery J., after holding that upon the true construction of the agreement a tenancy, not a licence, had been created, decided that the tenancy was a business tenancy within the meaning of the Act. It was argued that even though section 23 (2) is not a definition section to which the *ejusdem generis* rule can apply, the word "business" in that subsection, since it appears in inverted commas, must be applied in the sense in which it would ordinarily be used in everyday life, and the word "activity" in the same subsection must mean an activity of the same kind as would ordinarily be included in the word "business." But this argument was rejected on the ground that Parliament has said that the expression "business" includes a trade, profession and employment and "any activity" (not "any such activity") carried on by a body of persons corporate or unincorporate.

In reaching this conclusion Hilbery J. also relied on a passage from the judgment of Denning L.J. in *Hills (Patents), Ltd.* v. *University College Hospital Board of Governors* [1956] 1 Q.B. 90, 99, where it was held that the activity of managing a hospital was a "business" within the meaning of the Act. But he also expressed the hope that some other court would have an opportunity of considering the present case.

Betty's Cafés, Ltd. v. *Phillips Furnishing Stores, Ltd.*
[1957] 1 W.L.R. 799; [1957] 2 All E.R. 223n.

Landlord and Tenant Act, 1954—*business premises—landlord's intention to reconstruct.*—Danckwerts J. has now reheard this case, which was remitted to him for reconsideration upon the footing that it is open to a landlord to prove the necessary fixity and genuineness of his intention to reconstruct the premises at any time before an order has been made upon an application by his tenant for a new tenancy (see p. 169, *ante*). It was contended on behalf of the tenant

that the resolution of the landlord company which was passed in the course of the original hearing was not a genuine resolution showing a genuine intention on the part of the company to carry out the works of reconstruction required by the Act, and, further, that it did not show the necessary fixity and certainty of purpose. Danckwerts J. would have been very much inclined to agree with this view but for the fact that the resolution was coupled with authority to counsel to give an undertaking that the work would be carried out. He felt compelled to hold, however, that in view of the undertaking a genuine intention did exist, even though the resolution might not have been passed at that moment, if the tenants had not realised that the case might otherwise have gone against them. The undertaking, which the learned judge required to be given to the court, also compelled fixity of intention. The tenant's application for a new tenancy was therefore refused.

Kelsen v. *Imperial Tobacco Company (of Great Britain and Northern Ireland), Ltd.* [1957] 2 W.L.R. 1007; [1957] 2 All E.R. 343

Parcels—airspace—whether included in demise—advertising sign protruding into airspace—trespass—estoppel.—In April, 1946, a lease of a single storey tobacconist's shop with a flat roof was assigned to the plaintiff. At the time of this assignment certain advertising signs protruded some four inches into the airspace over the shop from the wall of the adjoining premises, which were let to the defendants. In April, 1948, the defendants sought permission of their landlords to substitute a new sign. The plaintiff's landlords, in reply to the defendants' landlords, did not object, but no further action was taken at this stage. In December, 1948, a new lease of the shop was granted to the plaintiff. In January, 1950, the defendants sought permission of their own landlords for a slightly altered sign, and again the plaintiff's landlords did not object. In November, 1950, a new sign was put up which protruded some eight inches into the airspace over the plaintiff's shop, and access was gained to it from time to time with the plaintiff's knowledge through the plaintiff's shop. In 1953, the plaintiff, after a dispute with the defendants, gave them notice to remove the sign, but subsequently allowed it to stay. In 1955, after further disputes, he gave a further notice and eventually brought this action for trespass. The defendants contended that (1) the airspace had never been demised to the plaintiff and (2) even if the airspace had been demised (a) it was demised subject to the rights granted by the plaintiff's landlords to use the airspace and (b) in any event the plaintiff was estopped by his conduct from objecting to the presence of the sign.

McNair J. rejected all these contentions. In his view a lease of single storey ground floor premises prima facie includes the airspace above these premises and there was nothing upon the true construction of this lease to rebut that presumption. Secondly, he held that the offending sign was put out under the permission granted in 1950 (*i.e.*, after the plaintiff's landlords had parted with all their rights in

the airspace) not that of April, 1948: and further that in any event the permission, upon its true construction, could not create an easement or other right which would affect the tenant. On the question of estoppel he held that the plaintiff had made no representation of any fact which he was seeking to deny: nor was there any equitable estoppel since the defendants were not induced by any impression which the plaintiff might have given to act to their prejudice to such an extent as would entitle them against him to a continuance of the exhibition of the sign.

He held also that the invasion of the plaintiff's airspace amounted to trespass (not nuisance), and granted a mandatory injunction that the sign should be removed forthwith.

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5. *REVENUE CASES*

By David R. Stanford, M.A., LL.B., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.) and *Taxation Reports* (T.R.).)

Hart v. *Sangster* [1957] 2 W.L.R. 812; [1957] 2 All E.R. 208; [1957] T.R. 73 (C.A.)

Income Tax—New source of income—Deposit account

Statutory provision: Finance Act, 1951, s. 21 (now Income Tax Act, 1952, s. 131 (3)).

Point: When a customer of a bank places money in a deposit account there is not a new contract every time money is deposited. The original and continuing contract is not, however, the "source" of the income which flows from that account by way of interest. The "source" is the deposit of money upon the terms of the contract and, as each fresh deposit is made, either a new source or an addition to a source of income has been made. The consequence flowing from this is that interest on new deposits in any year is technically taxable on the current year rather than on the preceding year basis (Income Tax Act, 1952, s. 131).

Facts and decision: A taxpayer who had kept a deposit account for some years and in early 1951 had a credit balance of some £20,000, in March that year deposited £2,000,000. The contract with the bank was on the usual terms, no special terms having been stipulated. Withdrawal would be on fourteen days' notice or by loss of fourteen days' interest; the crediting of interest was half-yearly, although it accrued from day to day, but save on closure of the account no accrued but uncredited interest could be withdrawn. The Crown claimed that the deposit of £2 million was a new source and applied the current year basis to tax interest credited in June, 1951. The Special Commissioners held that the contract was the source and that no new

source therefore arose. Vaisey J., on the Crown's appeal, held that a new contract arose on each deposit and that income first arose therefrom on being credited in June, 1951, that is in the year 1951–1952 and not the previous year in which the deposit was made.

Held: The source was the deposit of money on the terms of the pre-existing contract, and that the appeal should be dismissed, the result, although for different reasons, being that reached by Vaisey J., namely, the liability to tax in 1951–1952 for the income credited in that year.

It is not to be thought that an immediate dissection of all deposit accounts will now take place. The Lord Chief Justice (with whose judgment Jenkins and Sellers L.JJ. agreed) pointed to a continuation of the present practice of adopting the preceding year basis when he said (at [1957] 2 W.L.R. 819): "I quite agree that certain difficulties might be imposed on the Inland Revenue if they were to pursue every deposit account and find whether or not there had been an addition to the amount during the course of the year. That is a matter for the inspector of taxes or those responsible for the assessment to decide as to how they will deal with those matters."

C. I. R. v. *Buchanan* [1957] 3 W.L.R. 68; [1957] 2 All E.R. 400; [1957] T.R. 43 (C.A.)

Surtax—Settlement on children of settlor

Statutory provisions: Finance Act, 1936, s. 21 (now the Income Tax Act, 1952, ss. 397, 398, 399 and 403); Finance Act, 1943, s. 20 (now the Income Tax Act, 1952, s. 401).

The anticipated appeal by the Crown from the decision of Vaisey J. (noted Vol. 20, pp. 338–339) was unanimously allowed by the Court of Appeal, the reasoning of all three members thereof being the same. The facts, more fully set out in the note of the decision at first instance, were briefly that the respondent's wife was entitled to a protected life interest in funds settled by the will of her grandfather expectant on the death of her father. Under a power conferred by the said will she surrendered her life interest and the following day her father followed suit, with the result that her children became entitled to the settled funds, the income being applied for the maintenance of the children. The income so applied was successfully alleged by the Crown to be the income of the respondent's wife, and hence of her husband, for surtax purposes as being income paid to a child of the wife by virtue or in consequence of a settlement of which she was the settlor (Finance Act, 1936, s. 21 now Income Tax Act, 1952, s. 397).

Although in ordinary parlance the mere surrender of a limited interest would not be referred to as a "settlement," nevertheless it is clearly a "disposition." Having once had the interest and voluntarily given it up the person so doing has disposed of it. Thus the surrender was a settlement within the Finance Act, 1936, s. 21 (9) (now the Income Tax Act, 1952, s. 403). The wife was the sole

" settlor," having made the settlement, and the testator was neither a " settlor " nor " co-settlor " not having made this disposition. In rejecting the argument by counsel for the respondent that the destruction of the life interest, even if a " settlement," did not give a settled fund producing income, the court adverted to the fact that such an income is not essential to the operation of what is now the Income Tax Act, 1952, s. 397; " the section applies in general terms to *any* income and not necessarily income arising from a settled asset (*per* Jenkins L.J. [1957] 3 W.L.R., at p. 75).

The decision is of importance, therefore, in clarifying three aspects of these wide statutory provisions. First, that a settlement may be brought into being by the destruction of an asset. Secondly, that the settlement need not itself be of an income-producing asset, for income derived elsewhere than from a settled asset may be income paid " by virtue or in consequence of the settlement." Lastly, the donee of a power, exercising that power, is the settlor of any settlement thereby made, to the exclusion of the donor of the power. It would also appear from the judgment of Lord Goddard C.J., the reasoning in which was expressly concurred with by the other members of the court, that a will is not a " settlement " for the purposes of these provisions.

Leave to appeal to the House of Lords was granted.

Bridges v. *Hewitt*; *Same* v. *Bearsley* [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; [1957] T.R. 89 (C.A.)

Income Tax—Gift or profit from office—Gift by shareholders

Statutory provisions: Income Tax Act, 1952, s. 156 and Sched. IX, r. 1 (now the Finance Act, 1956, Sched. II, r. 1).

By a majority decision the Court of Appeal has reversed the decision of Danckwerts J. (noted at pp. 81–82, *ante*) and the taxpayers, subject to any appeal by the Crown to the House of Lords, will retain their gifts from the shareholders undiminished by the ravages of taxation. The facts, more fully set out at page 82, *ante*, may be summarised as follows. Two shareholders, intending to make a gift to two directors of the company of shares in the company, executed a covenant, in 1945, to transfer shares three months after the death of their mother, who was the present life tenant under their father's will, the shareholders being absolutely entitled in remainder expectant on their mother's death. Although intended as a personal testimonial in recognition of long, faithful and valuable service to the company, the covenant to transfer was expressed to be " In consideration of the covenantee continuing his present engagement with Meccano Ltd. until the expiry of four years from the date thereof." The directors completed the service indicated and in 1953 the shares were transferred. The Crown claimed tax thereon for the year 1953–1954.

The court unanimously rejected the contention, as had Danckwerts J., that evidence could be admitted to rebut the terms of the deeds

of covenant, and the principle that form governs liability to tax remains inviolate. The court, however, divided on the effect of the covenant for tax purposes. The question to be determined was, of course, whether the shares transferred amounted to a gift or to remuneration. Jenkins L.J., delivering the dissenting judgment, held that by the plain terms of the deeds the shares were given to the directors as such in consideration of services to be rendered by them. To hold otherwise, he stated, "seems to be to confound the motive for conferring the benefit with the character of the benefit conferred" ([1957] 1 W.L.R., at p. 688). His brethren, who were in the majority, reached a different conclusion. They construed the deed of covenant as binding the shareholders to transfer the shares only if the services were rendered, but not as binding the directors to perform the services if they chose not to do so. This they interpreted as a gift upon condition and not as a contractual arrangement. Morris L.J. stated ([1957] 1 W.L.R., at pp. 693, 694): "it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the gift is in recognition of services, or because the donor agreed to bind himself so as to be compellable at law to make the payment." The directors had been paid by the company for their services and the amount of shares "given" was not equated to any rate of remuneration for services. The deed of covenant recited that "the covenantor desired to mark his appreciation of the past services of the covenantee." Morris L.J. concluded that the shares "were received while Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director" ([1957] 2 W.L.R., at 698). Sellers L.J. likewise considered this a gift on a contingency, namely, the completion of four more years service, and not remuneration, the "link" with the employment being a condition precedent rather than the value received.

We have thus a further complexity added to the law relating to gifts and remuneration, namely the gift upon condition. Although in the peculiar circumstances of this case, where unfortunate drafting of the requisite documents has turned what was clearly a gift into a borderline case, one's sympathy is wholly with the taxpayer, the further confusion of the law must be regretted. Certainly the authority of this case with its unusual facts will render no aid to the adviser faced with a question of how to effect a gift by way of testimonial, although it will strengthen many a case where liability is already alleged by the Crown. Before additional bounty to employers is "given on condition that further services are rendered" it should be noted that in the present case (a) there was clear evidence of intended gift, (b) the donors were not the employers, (c) there was no binding agreement to serve the company, (d) the bounty might have been received during or after the service, (e) the amount was indication of a gift and (f) the services were otherwise fully remunerated.

The further argument of the directors that the shares, if taxable, should have been taxed on the agreement becoming binding in 1945 and not on the receipt of the shares in 1953, was considered by Jenkins L.J. He saw no reason to treat the remuneration (for he held the shares to be such) as received before the actual receipt

of the shares, that date having been fixed by agreement. He rejected the authority of *Salmon* v. *Wright*, 51 T.L.R. 333 and *Tait* v. *Smith* (1954) 35 T.C. 79 but gave no reason for doing so. No argument appears to have been addressed that the correct year for assessment was the year (apparently 1949) in which the service was completed and the consideration complete. Sellers L.J. agreed with Jenkins L.J., although such was not relevant to his judgment he having held the transfer to be a gift. Morris L.J., however, expressed the view that if the shares were remuneration, then it was in respect of services in various categories from 1907 to 1949 and could not all be regarded as "from" the office of managing director and hence could not all be taxed in 1953.

Leave to appeal to the House of Lords was granted.

THE LIBRARY

Tax Planning and the Family Company with Precedents. By David R. Stanford, m.a., ll.b., Barrister-at-Law. Sweet & Maxwell, Ltd. 412 pp. (£2 10s.)

The purpose of this book, as stated in the preface, is to give a co-ordinated account of the taxation problems facing the family company and its members. In fact, however, the scope of the book is rather less wide than that statement suggests: thus, for example, it does not deal to any great extent with overseas earnings or with capital allowances, which are today an important factor in planning future policy, or with the question of trading losses. But to record these omissions is not to criticise the book. It may, therefore, be useful to set out in general terms what the contents in fact are. After a first chapter which deals with the meaning of "control," Chapter 2 deals thoroughly with the estate duty which may be payable where a share holding passes on a death and falls to be valued according to the "market" valuation based upon section 7 (5) of the Finance Act, 1894, and with methods of reducing the liability to estate duty, particularly by means of sales, gifts and settlements. The next two chapters deal with the question of "Assets" valuation, both with respect to the valuation of shares under section 55 of the Finance Act, 1940, and in relationship to the provisions contained in section 46 of the Finance Act, 1940, and other sections which in certain circumstances deem the assets of the company to pass on the death of a shareholder. All the foregoing together makes up about half the book. The next three chapters deal with what are sometimes called "section 245 directions," with profits tax, and with grouping notices and subvention payments. Then Chapter 8 deals with insurance policies, and Chapter 9, which is the last, deals with "benefits from the company" that is to say, dividends, loans, bonus shares, salaries and so forth. Altogether, a book with an impressively wide scope, though not quite so wide as the preface might lead one to suppose. It should be added that there are no fewer than twenty-seven precedents.

Today the property lawyer cannot afford to neglect questions of revenue law. In the past it has been a common practice to treat revenue matters as the province of the specialist, the lawyer who is, or sets himself up as, a "tax expert," as if tax were some mystery beyond the grasp of ordinary intellects, or to say airily "Oh, I know nothing about tax, but I consider that I can deal with any tax problem that I spot, provided I have access to the necessary books." The riposte to the last remark is, "How do you spot the tax problem in the first place, unless you know something about tax?" It is true to say, that the property lawyer ought to know enough about revenue law to be able to know when a point of revenue law arises, and where to look for guidance when it does: this is not far short of saying, that he ought to know as much about revenue law as he knows about, for example, the Rent Acts, the jurisdiction of the Charity Commissioners, or settled land. In practice, the solicitor is likely to come across revenue law not as a distinct branch of practice, but in connection with his everyday conveyancing: the lease, the will, the settlement, the company articles, all require to be drafted with revenue law in mind if the client is not to be exposed to unnecessary risks. *Tax Planning and the Family Company* performs a valuable service in that it deals in one volume with many of the points of revenue law that are likely to crop up in everyday practice in connection with a controlled private company. It is additionally valuable in that it approaches each topic, not from the point of view of what tax or duty is payable and under what circumstances, but from the standpoint of one who seeks to know how far the charge to tax or duty does not

extend, rather than how far it does. Thus, although it is possible to find an excellent account of the "assets" valuation of shares for estate duty purposes in each of the major standard works on estate duty, there is no other book, so far as your reviewer is aware, which deals so fully with the various methods that may be adopted, to avoid the "assets" valuation. Indeed, with regard to Chapter 7, entitled "Groups of Companies," your reviewer knows of no other book whatever which sets out the possibility of using a grouping notice for the purpose of profits tax or of making subvention payments between related companies, and moreover gives a precedent of a subvention agreement which is flexible, yet sufficient to satisfy the requirements of the statute.

It is commonplace to say that a book fills a long-felt need, but this book does exactly that. The reader who is likely to find it most valuable is he who has already a knowledge of company law and practice, whether as solicitor or accountant, but has hitherto neglected questions of revenue law, and now wishes to be able to bring himself up to date. But there can be nobody who is so well versed in "tax planning" that he will not be able to derive considerable help from this book: quite apart from any other consideration, it is always helpful to see how another mind has dealt with a topic upon which the authorities, even if they exist, are inconclusive; for example, whether it is practicable from the legal point of view to transfer shares into the names and beneficial ownership of young infants, or whether a life directorship without extraordinary powers can amount to "powers equivalent to control."

The quality of the book is so high, that it is safe to make a number of criticisms of detail. Thus, the precedents are given in groups appended to each chapter, but it is not always clear why particular precedents are regarded as relevant to particular chapters. Why, for example, are the four precedents of settlements, which are among the longest in the book, not grouped together? Why does one discretionary settlement appear in Chapter 2, while the other appears in Chapter 5? Again, while there is a useful group of pension agreements, they are thrown in with the chapter which deals with assets valuation, and not with the later chapter which deals with dividends, salaries and so forth. One of the precedents—the first—is of an article which gives the directors an uncontrolled discretion to refuse to register any transfer of share whatever. This takes only four lines, admittedly, but it can scarcely be imagined that any draftsman will go out of his way to use it: surely a simple reference to article 3 of Table A Part II is all that is wanted. Precedent No. 12 is a settlement in favour of the infant children of the settlor contingently upon their attaining the age of twenty-five years: clause 8 thereof excludes the settlor from any benefit, but no note is appended thereto to warn the reader that this clause may in most cases be quite unnecessary. Precedent No. 7, which is a service agreement for a managing director, may puzzle the reader in its present form. It is an agreement for the director's life, which nevertheless provides that he may resign by six months' notice, and that his appointment shall determine if he is unable to attend to his duties owing to ill-health for a period of six month, or if he breaks any term of the agreement. There is also provision for a retirement pension. But there is no definition of "retirement." It may be possible to construe "retirement" as the same as resignation: but this produces the odd result that, in the event of the director's becoming an invalid unable to work, he will not get a pension unless, before giving up work, he sends in a resignation notice. This is hardly just. Apart from the foregoing criticisms, it must be stated that the book has its share of minor errors and lapses. Thus on page 142 the footnote is wrong, and there are throughout the book several small errors of grammar and style, for example, the use of a singular verb with a plural noun, which can no doubt be corrected in a future edition, and do not greatly detract from the real value of any book.

The above criticisms are of points of detail only. The careful draftsman does not follow any precedent slavishly, and so is unlikely to go astray as a result of any minor imperfection. Considered as a whole, this is a book to

which the property lawyer may refer in full confidence that he will find guidance on very many points of what may be called "company tax planning." It is clearly the result of a combination of learning and enthusiasm, and should be at the elbow of every practitioner who is ever likely to deal with the reorganisation of the affairs of a private company. No matter how much he knows, he will surely find fresh ideas here.

D. C. P.

The Rent Act, 1957. By Ashley Bramall, m.a., Barrister-at-Law. Current Law Guide, No. 13. Current Law Publishers, Ltd. xvi, 196 and (index) 7 pp. (12s. 6d.)

The New Rent Act. By R. B. Orange, m.a. Associated Newspapers, Ltd. 52 pp. (2s.)

Mr. Bramall's book was published within a matter of days of the new Rent Act receiving the Royal Assent and one might be pardoned for approaching it with some scepticism. The question any prospective buyer will ask himself is: Does the commentary really tell me anything I cannot find out from a careful perusal of the Act? We have been so familiar in the past with the commentary which consists of reproducing the Act section by section with a few cross-references, such as "'wash-tub' is defined in section 149 (1) (b). *Cf.* Ogle J.'s observations on 'scrubbing-board' in the rather different context of the Housewives (Maintenance) Act, 1922, s. 36 (2)." Mr. Bramall has set about his task in quite a different way. In 116 pages he takes us through the Act and Regulations in a logical and coherent narrative, properly marshalled into chapters and ordered into headings. On points of doubt he expresses his views and, whether we agree with them or not, the expression of a considered view is of considerable assistance in making one's own decision. When dealing with premiums after decontrol (pp. 35 to 38), it might have been useful to indicate that the prohibition does not extend to leases of twenty-one years or more, although this point is dealt with at p. 44. At p. 43, Mr. Bramall discusses the meaning of the expression "a term of years certain exceeding twenty-one years" and would exclude from this definition any lease of which it cannot be predicated with certainty that it will last for more than twenty-one years, but, if this is correct, every lease with a proviso for re-entry would be excluded. Might not the true position be that it is a lease which will last for at least twenty-one years unless determined earlier as a result of the tenant's act (*e.g.*, exercise of an option to break) or default (*e.g.*, breach of covenant)?

The new Act rather has the appearance of being the product of a tortuous mind warped by malice towards the whole race of landlords and tenants. It undoubtedly started as an ill-drawn Bill and became steadily worse as each little amendment was made with a view to conceding some political point in theory but not in practice. It can hardly be thought that August 17 would be made the last date for certain steps if Parliament really thought the point in question of serious moment. Perhaps the draftsman thought that, as he had his last chance on the Rent Acts, he would finish with something that would make the earlier Acts look lucid and simple by comparison. Whatever the reason, he made the task of the commentator extremely difficult and practitioners must be grateful for the service—and it undoubtedly is a service—that Mr. Bramall has rendered.

We can answer the question we first asked by saying that the practitioner will find the guide well worth buying. The author has obviously worked extremely hard and the result justifies his labours.

Mr. Orange's booklet is, of course, intended for laymen. It is extremely well written, as is testified by Mr. Megarry's foreword. It is a rather odd

reflection that such unpromising material as the Rent Acts seems to have found, of recent years, more satisfactory writers than probably any other subject but, if the reviewer may speak entirely for himself, he hopes that they will find other fields to till as he is heartily sick of the subject.

E. F. G.

Current Law Year Book, 1956, and *Current Law Citator, 1947 to 1956*. General editor: JOHN BURKE, Barrister-at-Law. *Year Book* editor: CLIFFORD WALSH, LL.M., Solicitor. Assistant general editor: PETER ALLSOP, M.A., Barrister-at-Law. Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. (Both volumes £4 4s.)

We have both an omission and a complaint to record. In the Companies Act, 1948, Sched. VII, the conditions of an exempt private company are laid down. One of these is that the company has not issued any debenture, which includes any mortgage, to a corporation other than certain specified ones including those designated by the Board of Trade. From time to time the Board of Trade has by order designated building societies as such corporations, but, so far as we can trace, no note of this has appeared in *Current Law*. As to our complaint, *Williams* v. *Unit Construction Co.* was fully reported at 19 *Conveyancer* 262; indeed, it is the only fully reported case in the *Conveyancer*. The table of cases should not therefore list it as unreported and it should note that it is a decision of the Court of Appeal.

It is almost impossible to review either of these volumes: either the reader uses the service or he does not. We expressed our view when reviewing the *Current Law Consolidation* some years ago when we said that *Current Law* was the most important addition to the practitioner's tools of trade since the war and a further five years of constant use has only served to confirm that view. Where an Act like the Landlord and Tenant Act, 1954, or presumably the Rent Act, 1957, gives rise to decisions in such rapid succession that the textbooks on the subject are almost out of date before they are published, the value of *Current Law* is seen to its best advantage. That we have only been able to trace one serious omission is some evidence that its claim to complete coverage is a sound one. The one uninspiring part of the service is the list of statutory instruments without titles. Incidentally, is it not about time a saner system of numbering statutes were devised? Probably ours is the only system in which an Act passed in 1894 would bear as part of its short title the date 1893.

E. F. G.

The Law of Trusts. 7th ed. By GEORGE W. KEETON, M.A., LL.D., Barrister-at-Law. Sir Isaac Pitman & Sons, Ltd. lxx, 465 and (index) 45 pp. (£2 10s.)

The 1930's saw the publication of many students' books of high merit, of which Keeton's *Law of Trusts* was one. It still retains its place in the forefront of students' books, but it has shown that unhappy tendency of growing too large for the student while not being full enough for the practitioner. The new edition has the appearance of being patched. A place in the text had to be found for *Re Astor's Settlement Trusts* [1952] Ch. 534, but one has the impression that it was tacked on at the end of the discussion of unenforceable trusts without regard to what has been written at the beginning of the discussion. *Re Miller's Agreement* [1947] Ch. 615 and *Harvell* v. *Foster* [1954] 2 Q.B. 367 merely appear in a footnote at pp. 8 and 10. The fact is that in recent years the courts have displayed a good deal of activity in the law of

trusts and analogous areas of the law, which necessitates reconsideration of fundamental principles, but we feel that these cases, though noted for the most part, have not been properly interwoven in the text. The book needs pruning; for example, the references to *fideicommissa* and Scottish law might be omitted and the part dealing with charities drastically curtailed. This would leave room for fuller consideration of modern developments. Incidentally, a seventh edition should not include the glaring error that by the Law of Property Act, 1925, s. 25 (4), a trust to retain or sell is now a trust to sell with power to postpone. Unfortunately, this heresy seems to infect trust corporations who often sell out a portfolio built up carefully by a testator and put the money into gilt-edged. Professor Keeton's book is still an excellent book for students, but it requires more drastic revision than it has received.

J. H. G.

Copyright and Performing Rights. By W. J. Leaper, ll.b., Barrister-at-Law. Stevens & Sons, Ltd. xi, 219 and (table of cases and index) 10 pp. (25s.)

This book is intended for the layman. It may fairly be described as a paraphrase of an annotated Copyright Act, 1956, with additional discussion of certain points. The previous law is very briefly treated, even where it will continue to be of greater importance than the new Act for some years to come. The author (who, although a barrister, appears not to be in practice) shows an unfortunate tendency to substitute extracts from what Mr. Derek Walker Smith said in the House of Commons that the Act would provide, for discussion of what the Act says. Neither Mr. Derek Walker Smith nor the author himself holds views that are beyond criticism: thus the author's first proposition of law ("Copyright, quite simply, is the right to copy . . .") comes almost into the class of famous last words. Various subsections of little or no real significance are given space that could have been better used—some of the best-known traps in our copyright law are not discussed at all. In spite of the work that has gone into the compilation of this book, it must be regarded as undistinguished.

No doubt books of this sort meet a real demand—they would not otherwise be published. No doubt also they are of service to laymen, if only in convincing them that the law is so obscure that professional advice is called for. Let those of us who practise the law consider ourselves lucky that we are not laymen, that we know where to find real textbooks and actual Acts of Parliament and can read them when we find them—and let us leave it at that.

T. A. B. W.

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer

Protective Trusts

Dear Sir,

I have read with interest the admirable article of Professor Sheridan concerning Protective Trusts in the March-April issue of *The Conveyancer and Property Lawyer* (*ante*, p. 110).

In the last paragraph the Professor appears to suggest that short of removal of the trustees there is no remedy against "recalcitrant" trustees. There is amply authority for saying that where trustees are under a duty to distribute property and in doing so are to judge of the necessity of the beneficiaries, the court can (*i.e.*, if the trustees fail to do so) make that judgment and decree a division accordingly: see *Gower* v. *Mainwaring* (1750) 2 Ves.Sen. 87; *cf. Mosley* v. *Moseley* (1673) Finch 53; *Wainwright* v. *Waterman* (1791) 1 Ves.Jun. 311. That rule applies where the beneficiaries are specified. It was said in one case that the court will look with the eyes of the trustees and substitute its own judgment: *Hewett* v. *Hewett* (1765) 2 Eden 332; *Maberly* v. *Turton* (1808) 14 Ves.Jun. 499. The court may proceed, as in *Doyley* v. *Att.-Gen.* (1735) 2 Eq.Cas.Ab. 195 and *Burrough* v. *Philcox* (1840) 5 M. & Cr. 72, on the basis that equality is equity, or in special circumstances will make a selection: see the dictum of Lord Alvanley in *Brown* v. *Higgs* (1800) 5 Ves.Jun. 504; and see the reference to *Richardson* v. *Chapman* (1760) 7 Bro.P.C. 318 in the last mentioned case.

It is emphasised that in *Re Gourju* [1943] Ch. 24 a definite obligation, as distinct from a mere power to apply the income, was established: see in that connection *Tempest* v. *Camoys* (1882) 21 Ch.D. 571, *Re Hodges* (1878) 7 Ch.D. 754 as to enforcement of the obligation, and consider the implications of *Re Johnston* [1894] 3 Ch. 204.

Probably I have misunderstood the meaning of the Professor; but he does suggest that the court "cannot exercise the power if the trustees fail to do so." They may incidentally be removable for recalcitrant failure to obey the court's order; but they may merely have disagreed and done nothing for that reason. The court could then step in: *Re Klug* [1918] 2 Ch. 67.

Yours faithfully,
E. O. Walford.

Bournemouth, April 16, 1957

[Professor Sheridan replies as follows:

Dr. Walford, in his usual erudite manner, has put his finger on what I regard as the most difficult statutory point relating to protective trusts. I shall endeavour to state the position, as I now see it in the light of Dr. Walford's letter, and confining myself to the authorities cited by him.

The first principle is that if there is power of appointment whose exercise is obligatory, and the date for making a selection passes (for example all the possible appointors die), the court will make an appointment: *Mosley* v. *Moseley* (1673) Finch. 53; *Doyley* v. *Att.-Gen.* (1714) 2 Eq.Cas.Ab. 194, pl. 15; *Brown* v. *Higgs* (1800) 5 Ves.Jun. 504; *Burrough* v. *Philcox* (1840) 5 My. & Cr. 72, 92.

The second principle relates to a case where a power must be exercised, and the discretion of the trustees is not broadened by any such word as

"uncontrolled" or "absolute," and where some additional test is superimposed, such as that appointees must be deserving or necessitous. In such a case, if the trustees do not apply the test at all (for example if there is disagreement between them), or if they do not arrive at a result satisfactory to the court, then the court will order an appointment or a different appointment as the case may be: *Gower* v. *Mainwaring* (1750) 2 Ves.Sen. 87; *Re Hodges* (1878) 7 Ch.D. 754; *Re Klug* [1918] 2 Ch. 67.

The third principle is that where the power must be exercised, but where the discretion is expressed to be uncontrollable or absolute or something like that, then the court will interfere only on the basis of *mala fides,* or, in other words, on a principle akin to fraud on a power: *Richardson* v. *Chapman* (1760) 7 Bro.P.C. 318; *Tempest* v. *Camoys* (1882) 21 Ch.D. 571; and see the article on "Discretionary Trusts" in the January/February issue of *The Conveyancer* this year.

Of the other cases cited by Dr. Walford, *Hewett* v. *Hewett* (1765) 2 Eden 332, and *Maberly* v. *Turton* (1808) 14 Ves.Jun. 449, are special cases which turn on the fact that there were no trustees. In *Wainwright* v. *Waterman* (1791) 1 Ves.Jun. 311, Lord Thurlow treated the disposition as a gift to an object subject to a power in the trustees to withhold it. As the trustees were not agreed, they could not withhold the gift, and so the object was entitled to it. In *Re Johnston* [1894] 3 Ch. 204, four people were each given a specified sum absolutely, as the court construed the gift, and the result was that the trustees had no discretion. This was not a case of a power of appointment, but of four people in a class each being given a specified sum.

That brings one to the question whether the power in section 33 of the Trustee Act, 1925, is one which must be exercised. Property is expressed to be held upon trust for all or any one or more, which could be construed as excluding the possibility of making no appointment at all. In *Re Wittke* [1944] Ch. 166, and *Re Gourju's Will Trusts* [1943] Ch. 24, the attitude was taken that all the income had to be applied to someone. If this is right, then if the trustees make no appointment, the court can do so. Yet the power is "as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit." Furthermore, in *Re Gourju's Will Trusts,* Simonds J., having said that the trustees were bound to apply the income when they received it, said: ". . . with, of course, such necessary limitations on absolute obligation as the practical necessities of the case demand." If a trustee is entitled to take the view that the practical necessities of the case demand that there should be no appointment, we seem to have got back to a state in which the power is not one which must be exercised, and, therefore, there is no room for the interference of the court.

Even if the power is one which must be exercised, and it is conceded that if the trustees make no appointment the court can do so, still there are other cases where the court can apparently not interfere. In *Re Gourju's Will Trusts,* Simonds J. said that the income must be applied for the purposes indicated in the subsection. He said that the trustees were not entitled to disregard the needs of the beneficiaries. But suppose that the trustees make an appointment which is bona fide, but which does not, in fact, to an impartial observer, appear to take account of the needs of the beneficiaries. The power in section 33 is an extended one by virtue of being described as absolute, and by virtue of the trustees being made not liable to account for the exercise of it. This would mean that if the trustees did make an appointment, the court could not interfere with it in the absence of *mala fides.*]